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A DEFENCE

FOR

FUGITIVE SLAVES,

AGAINST THE ACTS OF CONGRESS OF FEBRUARY 12, 1793, AND SEPTEMBER 18, 1850.

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DEFENCE FOR FUGITIVE SLAVES.

CHAPTER I.

Unconstitutionality of the Acts of Congress of 1793 *and* 1850.

SECTION 1.

ADMITTING, for the sake of the argument—*what is not true in fact*—that the words, "person held to service or labor," are a legal description of a slave, and that the clause of the Constitution in reference to such persons, and the Act of Congress of 1793, and the supplementary Act of 1850, for carrying that clause into effect, authorize the delivery of fugitive slaves to their masters—said acts (considered as one,) are nevertheless unconstitutional, in at least seven particulars, as follows:—

1. They authorize the delivery of the slaves without a trial by jury.

2. The Commissioners appointed by the Act of 1850, are not constitutional tribunals for the adjudication of such cases.

3. The *State* magistrates, authorized by the Act of 1793, to deliver up fugitives from service or labor, are not constitutional tribunals for that purpose.

4. The Act of 1850 is unconstitutional, in that it authorizes cases to be decided wholly on *ex parte* testimony.

5. The provisions of the Act of 1850, requiring the exclusion of certain evidence, are unconstitutional.

6. The requirement of the Act of 1850, that the cases be adjudicated "in a summary manner," is unconstitutional.

7. The prohibition, in the Act of 1850, of the issue of the writ of *Habeas Corpus* for the relief of those arrested under the act, is unconstitutional.

These several points I propose to establish.

SECTION 2.

*Denial of a Trial by Jury.**

NEITHER the Act of 1793, nor that of 1850, allows the alleged slave a trial by jury. So far as I am aware, the only argument, worthy of notice, that has ever been offered against the right of an alleged fugitive slave to a trial by jury, is that given by Mr. Webster, in his letter to certain citizens of Newburyport, dated May 15, 1850, as follows:—

"Nothing is more false than that such jury trial is demanded, in cases of this kind, by the constitution, either in its letter or in its spirit. The constitution declares that in all criminal prosecutions, there shall be a trial by jury; the reclaiming of a fugitive slave is not a criminal prosecution.

"The constitution also declares that in suits at common law, the trial by jury shall be preserved; the reclaiming of a fugitive slave is not a suit at the common law; and there is no other clause or sentence in the constitution having the least bearing on the subject."

In saying that "the reclaiming of a fugitive slave is not a criminal prosecution," Mr. Webster is, of course, correct. But in saying that "the reclaiming of a fugitive slave is not a suit at the common law," within the meaning of the constitutional amendment, that secures a jury trial "in suits at common law," he raises a question, which it will require something more than his simple assertion to settle.

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* The argument on this point is substantially the same as one embraced in the Letter of Hon. Horace Mann, published in the Boston Atlas, June 10, 1850. Although the argument implies no merit on my part—it being made up of definitions given by the Supreme Court—it may yet be proper for me—by way of avoiding the appearance of plagiarism—to say that it was published in Burritt's Christian Citizen of June 8th, 1850, two days before the publication of Mr. Mann's.

To determine whether the reclaiming of a fugitive slave is a "suit at common law," within the meaning of the above amendment to the constitution, it is only necessary to define the terms "suit" and "common law," as used in the amendment, and the term "claim," as used in that clause of the constitution, which provides that fugitives from service and labor "shall be delivered up on *claim* of the person to whom such service or labor may be due."

All these terms have been defined by the Supreme Court of the United States. Their definitions are as follows:

In the case of *Prigg* vs. *Pennsylvania*, the court say—

"He (the slave) shall be delivered up on *claim* of the party to whom such service or labor may be due. * * * A *claim* is to be made. What is a claim? It is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do, or to forbear to do, some act or thing as a matter of duty. A more limited, but at the same time an equally expressive definition was given by Lord Dyer, as cited in Stowell *vs.* Zouch, Plowden 359; *and it is equally applicable to the present case;* that 'a claim is a challenge by a man of the propriety or ownership of a thing which he has not in his possession, but which is wrongfully detained from him.' The slave is to be delivered up on the claim."—16 *Peters* 614–15.

In *Cohens* vs. *Virginia*, the court say:

"What is a *suit?* We understand it to be the prosecution, or pursuit, of some *claim*, demand, or request. In law language, it is the prosecution of some demand in a court of justice. 'The remedy for every species of wrong is,' says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' The instruments whereby this remedy is obtained, are a diversity of *suits* and actions, which are defined by the Mirror to be 'the lawful demand of one's right;' or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur*,'—(the form of prosecuting in trial, or judgment, what is due to any one.) Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party sueing claims to obtain something to which he has a right.

"To commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the

suit, is, according to the common acceptation of language, to continue that demand."—6 *Wheaton* 407-8.

In the case of *Parsons* vs. *Bedford et. al.*, the court define the term "common law," with special reference to its meaning in the amendment to the constitution, which secures the right of trial by jury "in suits at common law." The court say:

"The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared in the third article, 'that the judicial power shall extend to all cases in *law* and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, &c., and to all cases of admiralty and maritime jurisprudence. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. *By common law, they meant what the constitution denominated in the third article, 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.*" * * * *

"*In a just sense, the amendment, then, may be construed to embrace all suits which are not of equity and admiralty jurisprudence, whatever may be the peculiar form which they may assume to settle legal rights.*"—3 *Peters*, 446.

Such are the definitions given by the Supreme Court of the United States, of the terms "claim," "suit," and "common law," as used in the constitution and amendment. If these definitions are correct, they cover the case of fugitive slaves. If they are not correct, it becomes Mr. Webster to give some reason against them besides his naked assertion, that "the reclaiming of a fugitive slave is not a suit at the common law."

Mr. Webster is habitually well satisfied with the opinions of

the Supreme Court, when they make for slavery. Will he favor the world with his objections to them, when they make for liberty?

Perhaps Mr. Webster will say that, in the case of a fugitive slave, the matter "in controversy," is not "*value*"—to be measured by "*dollars*," but freedom. But it certainly does not lie in the mouth of the slaveholder, (however it might in the mouth of the slave,) to make this objection—because the slaveholder claims the slave as property—as "value" belonging to himself.

SECTION 3.

The Commissioners, authorized by the Act of 1850, *are not Constitutional Tribunals for the performance of the duties assigned them.*

THE office of the Commissioners, in delivering up fugitive slaves, is a *judicial* office. They are to try "suits at common law," within the meaning of the constitution, as has just been shown. They are to give, not only judgment, but final judgment, in questions both of property, and personal liberty—(of property, on the part of the complainant, and of liberty, on the part of the alleged slave.) Indeed, the Supreme Court have decided that the office of delivering up fugitive slaves is a judicial one. Say they,

"It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a *controversy* between the parties, and a *case* arising under the constitution of the United States; *within the express delegation of judicial power given by that instrument.*"—*Prigg vs. Pennsylvania*, 16 *Peters*, 616.

These Commissioners, therefore, are "judges," within the meaning of that term, as used in the constitution. And being

judges, they necessarily come within that clause of the constitution, (Art. 3, Sec. 1,) which provides that "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, *and shall, at stated times, receive for their services, a compensation*, which shall not be diminished during their continuance in office."

The object of this provision of the constitution, in requiring that all "judges" shall receive a fixed salary, or "a compensation, *at stated times*," instead of receiving their pay in the shape of fees in each case—thus making its aggregate amount contingent upon the number of cases they may try—was to secure their impartiality and integrity, as between the parties whose causes should come before them. If a judge were to receive his compensation in the shape of fees for each case, he would have a pecuniary inducement to give a case to the plaintiff, without regard to its merits. And for these reasons. Plaintiffs have the privilege of selecting their own tribunals. If a particular judge be known as uniformly or usually giving cases to plaintiffs, he thereby induces plaintiffs to bring their cases before him, in preference to other tribunals. He thus tries a larger number of cases, and of course obtains a larger amount of fees, than he would if he were to decide impartially. He thus induces also the institution of a larger number of suits than would otherwise be instituted, because if plaintiffs are sure, or have a reasonable probability, of gaining their causes, without regard to their merits, they will of course bring many groundless and unjust suits, which otherwise they would not bring.

It is obvious, therefore, that the payment of judges by the way of fees for each case, has a direct tendency to induce corrupt decisions, and destroy impartiality in the administration of justice. And the constitution—by requiring imperatively that judges "*shall* receive" a fixed salary, or "a compensation at stated times," has in reality provided that the rights of no man, whether of property or liberty, shall ever be adjudicated by a judge, who is liable to be influenced by the

pecuniary temptation to injustice, which is here guarded against.

The legal objection I now make is not that the Commissioners or judges are paid *double* fees for deciding against liberty, or for deciding in favor of the plaintiffs—(a provision more infamous probably, for the pay of the judiciary, than was ever before placed upon a human statute book)—but it is that they are paid in fees at all; that they receive no "compensation at stated times," as required by the constitution; that their pay is contingent upon the number of cases they can procure to be brought before them; in other words, contingent upon the inducements, which, by their known practice, they may offer to the claimants of slaves to bring their cases before them.

The argument on this point, then, is, that inasmuch as the constitution *imperatively requires* that "judges *shall receive, at stated times*, a compensation for their services," and inasmuch as the Act of 1850 makes no provision for paying these Commissioners any "compensation at stated times," they are not constitutional tribunals, and consequently, have no authority to act as judges or commissioners in execution of the law; and their acts and decisions are of necessity binding upon nobody. In short, a Commissioner, instead of being one of the judges of the United States, paid by the United States, is, in law, a mere hired kidnapper, employed and paid by the slave-hunter —and every body has a right to treat him and his decisions accordingly.*

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* The Commissioners are probably unconstitutional *judicial* tribunals for another reason, to wit, that the law, which authorizes their appointment, makes no provision that they "shall hold their offices during good behavior," as the constitution requires that "judges" shall do. The law says nothing of the tenure, by which they shall hold their offices; it simply provides "That it shall be lawful for the Circuit Court of the United States, to be holden in any district, * * to appoint such and so many discreet persons, in different parts of the district, as such court shall deem necessary, to take acknowledgments of bail and affidavits," &c.

Stat. 20th Feb., 1812, *U. S. Stat. at Large, Vol. 2, p.* 678.

I understand the general opinion to be that, under this law, the commissioners are entitled to hold their offices only during the pleasure of the courts that appoint them.

SECTION 4.

The State Magistrates, authorized by the Act of 1793, *to deliver up fugitives from service or labor, are not constitutional tribunals for that purpose.*

THE Act of 1793 *requires* the *State* magistrates—"any magistrate of a county, city, or town corporate"—to deliver up fugitives from service or labor. This provision is plainly unconstitutional, for several reasons, to wit:

1. The *State* Courts are not "established" by Congress, as the constitution expressly requires that all courts shall be, in whom "the judicial power of the United States shall be vested."

2. The "judges" of the *State* courts do not "at stated times, receive for their services a compensation," (from the United States,) as the constitution requires that the judges of the United States shall do.

3. The judges of the *State* courts do not receive their offices or appointments in any of the modes prescribed by the constitution. The president does not "nominate," nor does he "by and with the consent of the Senate, appoint" them to their offices; nor is their "appointment vested in the president alone, in the courts of law, or in the heads of departments."

4. The *State* magistrates are not commissioned by the President of the United States, as the constitution requires that "all officers of the United States" shall be.

5. The *State* judges are not amenable to the United States for their conduct in their offices; they cannot be impeached, or removed from their offices, by the Congress or the government of the United States.

For these reasons the Act of 1793, requiring the *State* magistrates to deliver up fugitives, is palpably unconstitutional. Indeed the Supreme Court of the United States have decided as much; for they have decided that,

"Congress cannot vest any portion of the judicial power of

the United States, except in courts ordained and established by itself."—*Martin vs. Hunters, Lessee*, 1 *Wheaton* 330.

Also, "The jurisdiction over such cases, (cases arising under the constitution, laws, and treaties of the United States,) could not exist in the State courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States."—*Same, p.* 335.

But although this act is thus palpably unconstitutional, the Supreme Court, in the Prigg case, with a corruption, that ought to startle the nation, and shake their faith in all its decisions in regard to slavery, declared that "no doubt is entertained by this court that State magistrates *may, if they choose,* exercise that authority, unless prohibited by State legislation." —16 *Peters*, 622.

Thus this court, who knew—as the same court had previously determined—that Congress could confer upon the State magistrates no "judicial power" whatever, nevertheless attempted to encourage them to assume the office of judges of the United States, and use it for the purpose of returning men into bondage—under the pretence that an act of Congress, *admitted to be unconstitutional*, would yet be a sufficient justification for the deed.

That court knew perfectly well that a law authorizing a claimant to arrest a man, on the allegation that he was a slave, and then take him before the first man or woman he might happen to meet in the street, and authorizing such man or woman to adjudicate the question, would be equally constitutional with this act of 1793, and would confer just as much judicial authority upon such man or woman, as this act of 1793 conferred upon the State magistrates; and that it would be just as lawful for such man or woman to adjudicate the case of an alleged slave, and return him into bondage, under such a law, as it is for a State magistrate to do it under the law of 1793.

It is worthy of remark, that the same judge—and he a northern one, (Story,)—who delivered the opinion, declaring

that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself," delivered the other opinion declaring that "no doubt is entertained by this court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

It is also worthy of notice, that every one of the definitions before given, (Sec. 2,) of "claim," "suit," and "common law,"—from which it appears that a "claim" for a fugitive slave is a "suit at common law," within the meaning of the constitution, and must therefore be tried by a jury—were taken from opinions delivered in the Supreme Court by Story. He also, in the Prigg case, said that a claim for a fugitive slave "constitutes, in the strictest sense, a *controversy* between the parties, and a *case* 'arising under the constitution of the United States,' within the express delegation of *judicial power* given by that instrument." And yet this same Story, in his Commentaries on the Constitution, says that this "suit at common law," this "*controversy* between the parties," this "*case* arising under the constitution, within the express delegation of *judicial power* given by that instrument," has no more claim to a *judicial* investigation on its merits, than is had when a fugitive from justice is delivered up for trial. He says,

"It is obvious that these provisions for the arrest and removal of fugitives of both classes contemplate *summary ministerial* (not judicial, but *ministerial*—that is executive) proceedings, and not the ordinary course of judicial investigations, to ascertain whether the complaint be well founded, or the claim of ownership be established beyond all legal controversy. In cases of suspected crimes the guilt or innocence of the party is to be made out at his trial; and not upon the preliminary inquiry, whether he shall be delivered up. All that would seem in such cases to be necessary is, that there should be *prima facie* evidence before the executive authority to satisfy its judgment, that there is *probable cause* to believe the party guilty, such as upon an ordinary warrant would justify his commitment for trial. And in cases of fugitive slaves there would seem to be the same necessity for requiring only *prima facie* proofs of ownership, without putting the party, (the claimant,) to a formal assertion of his rights by a suit at law."

3 *Story's Commentaries*, 677–8.

The Act of 1850 is unconstitutional for the same reason as is the Act of 1793; for the Act of 1850 (Sec. 10,) authorizes *any State Court of record, or judge thereof in vacation*, to take testimony as to the two facts of a man's being a slave, and of his escape; and it provides that any testimony which shall be "satisfactory" to such *State* "court, or judge thereof in vacation," *on those two points*, "shall be held and taken to be full and conclusive evidence" of those facts, by the *United States* "court, judge, or commissioner," who may have the final disposal of the case.

It thus authorizes the *State* court, or judge thereof in vacation, absolutely, and without appeal, *to try those two points in every case*—leaving only the single point of identity to be tried by the United States "court, judge, or commissioner."

Now it is as clearly unconstitutional for Congress to give, to a *State* court or judge, final jurisdiction, (or even partial jurisdiction,) of two-thirds of a case, (that is, of two, out of the only three, points involved in the case,) as it would be to give them jurisdiction of the whole case.

I suppose the ground, if any, on which Congress would pretend to justify this legislation, is the following provision of the constitution—(Art. 4, Sec. 1.)

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, *and the effect thereof*."

But "the public acts, records, and judicial proceedings" *of a State*, which are here spoken of, are only "the public acts, records, and judicial proceedings," done, made, and had, *by State officers, under the laws of the State.* A State judge is not an officer of the *State*, when exercising an authority conferred upon him by the United States; nor are his "acts, records, or judicial proceedings," the "acts, records, or judicial proceedings" *of the State*—but only of the United States.* It is only

* In truth, "the acts, records, and judicial proceedings" of a State judge, when exercising a judicial authority purporting to be conferred upon him by the United States, are not even the "acts, records, or judicial proceedings" of the *United States*—for the

when acting as an officer *of the State, under the laws of the State*, that his "acts, records, and judicial proceedings" are the "acts, records, and judicial proceedings" *of the State.*

Congress seem to have been inspired with the idea that, although they could not directly confer upon a State judge that "judicial power," which the constitution requires to be vested only in judges of the United States, yet, if, by any unconstitutional law, they could but *induce* a State judge to exercise "the judicial power of the United States," so far as to hear and determine upon the evidence, (in a case arising under the constitution and laws of the United States,) *and make a record of his proceedings and determination*, they (Congress) could then, by virtue of this article of the constitution, "prescribe the manner in which such *records and judicial proceedings* shall be proved, *and the effect thereof*," (before a court of the United States,) as if they were really the "records and judicial proceedings" of the State itself.

If this wonderfully adroit process were to succeed, Congress would be able to transfer all the *real* "judicial power of the United States," to the *State* "courts, or judges thereof in vacation"—leaving the United States courts nothing to do but to receive the "*records*" made by these State courts and judges, and give them such "*effect*" as Congress might prescribe.

But this remarkable contrivance must fail of its purpose, unless it can be shown that the "acts, records and judicial proceedings," which may be had and made by a State "court of record, or judge thereof in vacation,"—not by virtue of any authority granted them by the State, but only by virtue of an unconstitutional law of Congress—are really the "acts, records, and judicial proceedings" of the State itself.

The motive of this attempt, on the part of Congress, to transfer to the State courts and judges full and final jurisdiction over the two facts, that a man was a slave, and that he escaped, is doubtless to be found in the statement made by

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United States have no constitutional power to confer any such authority upon him—and consequently his acts, in execution of such an authority, are legally nothing more than his private acts as an individual.

Senator Mason, of Virginia, the Chairman of the Committee that reported the bill, and the principal champion of the bill in the Senate. In a speech upon the bill, on the 19th day of August, 1850, (as reported in the Washington Union and Intelligencer,) in describing "the actual evils under which the slave States labor in reference to the reclamation of these fugitives," he said—

"Then again, it is proposed, (by one of the opponents of the bill,) as a part of the proof to be adduced at the hearing after the fugitive has been recaptured, that evidence shall be brought by the claimant to show that slavery is established in the State from which the fugitive has absconded. Now, this very thing, in a recent case in the city of New York, was required by one of the judges of that State, which case attracted the attention of the authorities of Maryland, and against which they protested, because of the indignities heaped upon their citizens, and the losses which they sustained in that city. In that case, the judge of the State court required proof that slavery was established in Maryland, and went so far as to say that the only mode of proving it was by reference to the statute book. Such proof is required in the Senator's amendment; and if he means by this that proof shall be brought that slavery is established by existing laws, it is impossible to comply with the requisition, for no such proof can be produced, I apprehend, in any of the slave States. *I am not aware that there is a single State in which the institution is established by positive law.* On a former occasion, and on a different topic, it was my duty to endeavor to show to the Senate that no such law was necessary for its establishment; certainly none could be found, and none was required in any of the States of the Union."

It thus appears by the confession of the champion of the bill himself, that every one of these fugitive slave cases would break down on the first point to be proved, to wit, that the alleged fugitive was a slave—if that fact were left to be proved before a court that should require the claimant to show any law which made the man a slave. It was therefore indispensable that this fact should be proved only to the satisfaction of one of those State judges, who have acquired the habit of deciding men to be slaves, without any law being shown for it.

SECTION 5.

Ex parte Evidence.

THE Act of 1850 is unconstitutional, in that it authorizes cases to be decided wholly on ex parte testimony.

The 4th Section of the act makes it the "duty" of the "court, judge, or commissioner," to deliver up an alleged fugitive, "upon satisfactory proof being made by deposition or *affidavit*, in writing, * * or by other satisfactory testimony, * * and with proof also by *affidavit* of the identity of the person," &c.

It thus *allows* the whole proof to be made by "*affidavit*" alone, which is wholly an *ex parte* affair. And if this testimony be "satisfactory" to the court, judge, or commissioner, they are authorized to decide the case upon that testimony alone, without giving the defendant any opportunity to confront or cross-examine the witnesses of the claimant, or to offer a particle of evidence in his defence.

The 10th Section of the act is of the same character as the 4th, *except that it is worse.* It first provides that a claimant—by a wholly *ex parte* proceeding—may make "satisfactory proof"—to "any court of record, or judge thereof in vacation," in the "State, Territory, or District," from which a fugitive is alleged to have escaped—that a person has escaped, and that he owed service or labor to the party claiming him. It then, not merely permits, but *imperatively requires*, that this *ex parte* evidence, when a transcript thereof is exhibited in the State where the alleged fugitive is arrested, "*shall be held and taken to be full and conclusive evidence* of the fact of escape, and that the service or labor of the person escaping is due to the party in the record mentioned."

It thus absolutely *requires*, that on the production of certain *ex parte* evidence by the claimant, the court, judge, or commissioner *shall* decide these two points—the fact of escape, and that the fugitive owed service or labor to the claimant—*against the defendant, without giving him a hearing.*

It then *permits* the judge to decide the only remaining point, to wit, *the identity* of the person arrested with the person escaped—upon the same testimony. But it *allows* him to receive "other and further evidence, *if necessary*," on this single point of identity.

Thus this section imperatively prescribes that, at the pleasure of the claimant, certain *ex parte* testimony "shall be held" and taken to be full and conclusive evidence," on two, out of the three, points involved in the case. And on the only remaining point, it requires "other and further evidence," only on the condition that it shall be "*necessary*" in the mind of the judge or commissioner. And if "other and further evidence" be "necessary," that also may be "either oral, or by *affidavit*," which last is necessarily *ex parte*.

Thus the act authorizes the whole case to be decided wholly on *ex parte* evidence, if such evidence be "satisfactory" to the commissioner; and, at the option of the claimant, it makes it *obligatory* upon the commissioner to receive such testimony as "full and conclusive evidence," on two, out of the only three, points involved in the case.

There is not a syllable in the whole act that suggests, implies, or requires that the individual, whose liberty is in issue, shall be allowed the right to confront or cross-examine a single opposing witness, or even the right to offer a syllable of rebutting testimony in his defence.

Now, I wish it to be understood that I am not about to argue the enormity of such an act, but only its unconstitutionality.

The question involved is, whether Congress have any constitutional power to authorize courts to decide cases, "suits at common law," or any other cases, on *ex parte* testimony alone?

The constitution declares that "the judicial power shall extend to all *cases* in law and equity, arising under this constitution, the laws of the United States, * * to *controversies* to which the United States shall be a party; to *controversies* between two or more States, between a State and citizens of another State, between citizens of different States," &c., &c.

What then is a "*case?*" "Case" is a technical term in the law. It is a "suit," a "controversy" before a judicial tribunal, or umpire. The constitution uses the three terms, "case," "suit," and "controversy," as synonymous with each other. They all imply at least two parties, who are antagonists to each other. There can be no "controversy," where there is but one party. Nor can there be a "controversy" where but one of the parties is allowed to be heard.

Say the Supreme court, "A case in law or equity consists of the right of one party, as well as of the other."

Cohens vs. Virginia, 6 *Wheaton* 379.

What is this "right" which is at the same time "the right of one party, as well as of the other?" It cannot be a right to the thing in controversy; because that can be the right of but one of them. The "right," therefore, that belongs to "one party as well as the other," can be nothing less than the equal right of each party to produce all the evidence naturally applicable to sustain his own claim, and defeat that of his adversary; to have that evidence weighed impartially by the tribunal that is to decide upon the facts proved by it; and then to have the law applicable to those facts applied to the determination of the controversy.

It has already been shown that the claim to a fugitive slave, is a "case," "suit," and "controversy," arising under the constitution of the United States; and as such, to use the language of the court, is "within the express delegation of *judicial power* given by that instrument."

The question now arises, what is "*the judicial power* of the United States?"

I answer, it is the power to take judicial cognizance or jurisdiction of, *to try*, adjudicate, and determine, all "cases," "suits," and "controversies, arising under the constitution and laws of the United States," &c.

The judicial power, therefore, being power *to try* cases, necessarily includes a power to *determine what evidence is applicable to a case*, and to *admit*, hear, and weigh all the evidence that is applicable to it. A case can be tried only on the evi-

dence presented. In fact, the evidence constitutes the case to be tried. If a part only of the evidence, that is applicable to a case—or that constitutes the case—or that is necessary for the discovery of the truth of the case—be presented, weighed, and tried, the case really in controversy between the parties is not tried, but only a fictitious one, which Congress or the courts have arbitrarily substituted for the true one. If, whenever a case, arising under the constitution or laws of the United States, is instituted by one indivdual against another, Congress have constitutional power to substitute a fictitious case for the real one, and to require that the real one abide the result of the fictitious one, they have power to authorize cases to be tried on *ex parte* testimony—otherwise not. In what clause of the constitution such a power is granted to Congress, no one, so far as I am aware, has ever deigned to tell us.

No one will deny that the question, what evidence is admissible in a case, or makes part of a case, or is applicable to a case, is, *in its nature*, a judicial question. And if it be, *in its nature*, a judicial question, the power to determine it is a part of "the judicial power of the United States," *and consequently is vested solely in the courts.* And Congress have clearly as much right to usurp any other "judicial power" whatever, as to usurp the power of deciding what evidence is, and what is not, admissible—or what evidence shall, and what evidence shall not, be admitted.

As a general rule, the decision of these questions, of the admissibility of evidence, is left to the courts. But legislatures are sometimes so ignorant or corrupt as to usurp this part of "the judicial power;" and the courts are always, I believe, ignorant, servile, or corrupt enough to yield to the usurpation.

The simple fact that all questions of the admissibility of evidence are, *in their nature*, judicial questions, proves that the power of deciding them, is a part of "the judicial power of the United States;" and as *all* "the judicial power of the United States" is vested in the courts, it necessarily follows that Congress cannot legislate at all in regard to it, either by prescribing what evidence shall, or what shall not, be admitted, in

any case whatever. For them to do so is a plain usurpation of "judicial power."

Among all the enumerated powers, granted to Congress, there is no one that includes, or bears any, the remotest, resemblance to a power to prescribe what evidence shall, and what shall not, be admitted by the courts, in the trial of a case. There is none that bears any resemblance to a power to authorize or require the courts to decide cases on *ex parte* testimony alone. If a judge were thus to decide a case, of his own will, he would be impeached. The assumption, on the part of Congress, of a power to authorize the courts to do such an act, is a thoroughly barefaced usurpation. If Congress can authorize courts to decide cases, on hearing the testimony on one side only, they have clearly the same right to authorize them to decide them without hearing any evidence at all.

SECTION 6.

The provisions of the act of 1850 *requiring the exclusion of certain evidence, are unconstitutional.*

Those provisions of the act, which specially require the exclusion of certain testimony, naturally applicable to the case, are unconstitutional for the same reason as are those which purport merely to authorize or allow the decision of the case on *ex parte* testimony. That reason, as has been already stated in the preceding section, is that such legislation is an usurpation, by Congress, of "the judicial power"—or rather an attempt to control the judicial power—for which no authority is given in the constitution. "The judicial power" being vested in the courts, Congress can of course neither exercise nor control it.

If congress can, by statute, require the exclusion of any testimony whatever, that is naturally applicable to a case, they can require the exclusion of all testimony whatever, and require cases to be decided by the courts, without hearing any evidence at all.

There are two provisions in the act of 1850, which specially require the exclusion of testimony, on the part of the defendant. The first is the one, (sec. 10), already commented upon, which requires that certain *ex parte* testimony taken by the claimant, "shall be held and taken to be full and conclusive evidence," on the two points to which it relates, to wit, the fact of slavery, and the fact of escape. This requirement that this *ex parte* testimony shall "be held and taken to be full and conclusive evidence" of those two facts, is an express exclusion of all rebutting testimony relative to those facts.

The other provision of this kind, is in the 4th section, in these words.

"In no trial or hearing, under this act, shall the testimony of such alleged fugitive be admitted."

The act itself admits that the testimony of one of the parties, the claimant, is legitimate evidence—for it permits it to be received, and, if it be "satisfactory" to the court, judge, or commissioner, allows the case to be determined on his testimony alone. Indeed, without the claimant's own testimony, his case could rarely, if ever, be made out—because he alone could generally know whether he owned the slave, and he alone (except the slave) could know whether the slave escaped, or whether he had permission to go into another state. It is therefore indispensable to the success of these cases generally, that the claimant's own testimony should be received; and if his testimony be admissible, the testimony of the opposing party must be equally admissible; and for Congress to prohibit its admission is, for the reasons already given, an usurpation of "the judicial power."*

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* On general principles, the testimony of the parties themselves, in all cases, civil and criminal, is legitimate, and neither Congress nor the courts have any authority to exclude it.

In *civil* cases the testimony of the parties is legitimate, because they alone know the *whole* truth, as to the matter in controversy, and it is hardly possible to conceive of a case in which it would not be for the interest of one or the other of the parties to disclose it. If, therefore, the parties themselves are allowed to testify, it is morally certain, as a general thing, that the whole truth will be told. If the parties *agree* in their testimony, the facts of the case are at once ascertained, and the necessity and expense of further testimony is saved. If they disagree, the testimony of third persons can

SECTION 7.

The requirement of the act of 1850, *that the cases be adjudicated "in a summary manner," is unconstitutional.*

Section 6th of the act makes it the "duty" of the court, judge, or commissioner, "to hear and determine the case of such claimant in a summary manner."

This determining the case in a summary manner is only another mode of excluding testimony on the part of the defendant. The plaintiff of course prepares his testimony beforehand, and has it ready at the moment the alleged fugitive is arrested. If the case then be tried, without giving the defendant time to procure any testimony, the decision must necessarily be made upon the testimony of the claimant alone. Such is the design of the act, for the defendant being arrested, the

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then be brought in as supplementary to that of the parties; and the presumption must be that it will corroborate the party whose testimony is true. But if the testimony of third persons alone is received, there can be no certainty at all that the whole truth is told, in hardly any conceivable case; and consequently there can be no certainty that the decision corresponds with the real merits of the case.

It is absurd to exclude both the parties, on the ground of interest, for two reasons. 1. Because they have the same interests respectively; their opposing interests therefore exactly balance each other; and they consequently stand on a perfect level with each other in that respect. 2. Because, being parties, their interests are necessarily known to the tribunal that weighs their testimony, and that tribunal will of course make the proper allowance for their interests, and judge of the credibility of their testimony accordingly.

In suits in equity, all courts receive the testimony of the parties themselves; and there is no rational ground whatever for making a distinction, in this respect, between suits in equity, and suits in law. Blackstone says,

"It seems the height of judicial absurdity, that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall, (in the equity courts), and denied on the other, (in the law courts); or that judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar, but, when sitting the next day as a court of equity, should be obliged to hear such examinations read, and to found their decrees upon it."

3 *Blackstone, Ch.* 23.

In *criminal* cases, nothing can be more absurd, cruel, or monstrous, nothing more manifestly contrary to all the dictates of humanity, justice, and common sense, than to close the mouth of an accused person, and forbid him to offer any explanation or justification of his conduct, or to give any denial to the testimony brought against him—and thus throw him, for the protection of his life, liberty, and character, upon such evidence of other persons as chance may happen to throw in his way.

No doubt the *guilty* would generally attempt to hide their guilt by falsehood; but to

act requires that he shall be "taken *forthwith* before such court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant in a *summary manner*,"—that is, without granting the delay necessary to enable the defendant to obtain testimony for his defence.

The whole object and effect of this provision is to make it necessary for the court to determine the case on the evidence furnished by the plaintiff alone. And the exclusion of all testimony for the defendant, by this "summary" process, is equally unconstitutional with its exclusion in the manner commented on in the last two preceding sections—for the right of a party to be heard in a court of justice, necessarily implies a right to reasonable time in which to procure his testimony.

SECTION 8.

The suspension of the writ of Habeas Corpus, by the act of 1850, *is unconstitutional.*

Section 6th of the act provides that "the certificates in this and the first section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the state or territory from which he

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presume that an accused person will testify falsely, is to presume him guilty before he is heard, which we have no right to do. The law presumes an accused person innocent until he is proved guilty. Consistently with this presumption, the law is bound to presume that he will tell the truth, because, if he be innocent, as the law presumes him to be, the truth would best serve his purpose.

If the principle of shutting the mouth of an accused person, and compelling him to rely for his defence upon such stray evidence as may chance to fall in his way, be a sound one, it should be acted upon always, and everywhere. The father should strike, but never hear, his child. And it should be the same throughout society. A man accused of any thing offensive or injurious to others, should never be allowed, with his own lips, either to deny the act, or justify it.

It is manifest that if such a principle were acted upon in society generally, it would lead to universal war. Yet the principle would be no less absurd or monstrous in society at large, than it is in courts of justice.

The fear of falsehood, which has led to the adoption of this principle, has no justification in practical life; for a guilty man is much more likely to entrap, than to exculpate himself, when he attempts to defend himself by falsehood.

escaped, *and shall prevent all molestation of such person or persons, by any process issued by any court, judge, magistrate, or other person, whomsoever.*"

This is a prohibition upon the issue of the writ of *habeas corpus*, and is a violation of that clause of the constitution, which says that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

In cases where no appeal lies to a superior court, (and in this case no appeal is granted, and the constitution, art. 3, sec. 2, clause 2, does not require an appeal,) the *habeas corpus* is the only mode of relief for a person deprived of his liberty by any illegal proceeding; and a prohibition upon the use of the *habeas corpus* for the purpose of inquiring into the proceedings, and determining whether they have been legal, and releasing the prisoner if they have been illegal, is as palpable a violation of the constitution on this point as it is possible to conceive of.

Upon a writ of *habeas corpus*, it would be the duty of the court to inquire fully into the several questions, whether the person, who had assumed to act as judge, and restrain the prisoner of his liberty, was really a judge, appointed and qualified as the constitution requires? Whether the law, under color of which the man was restrained, was a constitutional one? Whether the prisoner had been allowed a trial by jury? Whether he had been allowed to offer all the testimony, which he had a constitutional right to offer, in his defence. Whether he had had reasonable time granted him, in which to procure testimony? And generally into all questions involving the legality of his restraint; and to set him at liberty, if the restraint should be found to be illegal.

CHAPTER II.

The Right of Resistance, and the Right to have the Legality of that Resistance judged of by a Jury.

If it have been shown that the acts of 1793 and of 1850, are unconstitutional, it follows that they can confer no authority upon the judges and marshals appointed to execute them; and those officers are consequently, in law, mere ruffians and kidnappers, who may be lawfully resisted, by any body and every body, like any other ruffians and kidnappers, who assail a person without any legal right.

The rescue of a person, who is assaulted, or restrained of his liberty, without authority of law, is not only morally, but legally, a meritorious act; for every body is under obligation to go to the assistance of one who is assailed by assassins, robbers, ravishers, kidnappers, or ruffians of any kind.

An officer of the government is an officer of the law only when he is proceeding according to law. The moment he steps beyond the law, he, like other men, forfeits its protection, and may be resisted like any other trespasser. An unconstitutional statute is *no law*, in the view of the constitution. It is void, and confers no authority on any one; and whoever attempts to execute it, does so at his peril. His holding a commission is no legal protection for him. If this doctrine were not true, and if, (as the supreme court say in the Prigg case,) a man *may, if he choose*, execute an authority granted by an unconstitutional law, congress may authorize whomsoever they please, to ravish women, and butcher children, at pleasure, and the people have no right to resist them.

The constitution contemplates no such submission, on the part of the people, to the usurpations of the government, or to the lawless violence of its officers. On the contrary it provides that "The right of the people to keep and bear arms shall not be infringed." This constitutional security for "the right to keep and bear arms," implies the right to use them,—

as much as a constitutional security for the right to buy and keep food, would have implied the right to eat it. The constitution, therefore, takes it for granted that, as the people have the right, they will also have the sense, to use arms, whenever the necessity of the case justifies it. This is the only remedy suggested by the constitution, and is necessarily the only remedy that can exist, when the government becomes so corrupt as to afford no peaceable one. The people have a legal right to resort to this remedy at all times, when the government goes beyond, or contrary to, the constitution. And it is only a matter of discretion with them whether to resort to it at any particular time.

It is no answer to this argument to say, that if an unconstitutional act be passed, the mischief can be remedied by a repeal of it; and that this remedy may be brought about by discussion and the exercise of the right of suffrage; because, if an unconstitutional act be binding until invalidated by repeal, the government may, in the mean time disarm the people, suppress the freedom of speech and the press, prohibit the use of the suffrage, and thus put it beyond the power of the people to reform the government through the exercise of those rights. The government have as much constitutional authority for disarming the people, suppressing the freedom of speech and the press, prohibiting the use of the suffrage, and establishing themselves as perpetual and absolute sovereigns, as they have for any other unconstitutional act. And if the first unconstitutional act may not be resisted by force, the last act that may be necessary for the consummation of despotic authority, may not be.

To say that an unconstitutional law must be obeyed until it is repealed, is saying that an unconstitutional law is just as obligatory as a constitutional one,—for the latter is binding only until it is repealed. There would therefore be no difference at all between a constitutional and an unconstitutional law, in respect to their binding force; and that would be equivalent to abolishing the constitution, and giving to the government unlimited power.

The right of the people, therefore, to resist an unconstitutional law, is absolute and unqualified, from the moment the law is enacted.

The right of the government "to suppress insurrection," does not conflict with this right of the people to resist the execution of an unconstitutional enactment; for an "insurrection" is a rising against the *laws*, and not a rising against usurpation. If the government and the people disagree, as to what are *laws*, in the view of the constitution, and what usurpations, they must fight the matter through, or make terms with each other as best they may.

But for this right, on the part of the people, to resist usurpation on the part of the government, the individuals constituting the government would really be, *in the view of the constitution itself*, absolute rulers, and the people absolute slaves. The oaths required of the rulers to adhere to the constitution, would be but empty wind, as a protection to the people against tyranny, if the constitution, at the same time that it required these oaths, committed the absurdity of protecting the rulers, when they were acting contrary to the constitution. The constitution, in thus protecting the rulers in their usurpations, would continue to act as a shield to tyrants, after they themselves had deprived it of all power to shield the people. It would thus invite its own overthrow, and the conversion of the government into a despotism, by those appointed to administer it for the liberties of the people.

This right of the people, therefore, to resist usurpation, on the part of the government, is a strictly *constitutional* right. And the exercise of the right is neither rebellion against the constitution, nor revolution—it is a maintenance of the constitution itself, by keeping the government within the constitution. It is also a defence of the natural rights of the people, against robbers and trespassers, who attempt to set up their own personal authority and power, in opposition to those of the constitution and people, which they were appointed to administer.

To say, as the arguments of most persons do, that the peo-

ple, in their individual and natural capacities, have a right to *institute* government, but that they have no right, in the same capacities, to preserve that government by putting down usurpation—and that any attempt to do so is revolution, is blank absurdity.

The right and the physical power of the people to resist injustice, are really the only securities that any people ever can have for their liberties. Practically no government knows any limit to its power but the endurance of the people. And our government is no exception to the rule. But that the people are stronger than the government, our representatives would do any thing but lay down their power at the end of two years. And so of the president and senate. Nothing but the strength of the people, and a knowledge that they will forcibly resist any very gross transgression of the authority granted by them to their representatives, deters these representatives from enriching themselves, and perpetuating their power, by plundering and enslaving the people. Not because they are at heart naturally worse than other men; but because the temptations of avarice and ambition, to which they are exposed, are too great for the mere virtue of ordinary men. And nothing but the fear of popular resistance is adequate to restrain them. As it is, the great study of many of them seems to be to ascertain the utmost limit of popular acquiescence. Once in a while they mistake that limit, and go beyond it.

But, to return. As every body who shall resist an officer in the execution of these fugitive slave laws, will be liable to be tried for such resistance, and to be thus laid under the necessity of proving the unconstitutionality of the laws to the satisfaction of the tribunal by whom he is tried; and as judges are in the nearly unbroken habit of holding all legislation to be constitutional; and especially as the Supreme Court of the United States have held, (in the Prigg case, as before cited,) that the sending of men into bondage is so important an object to be accomplished, that an officer *may, if he choose, exercise an authority conferred only by an unconstitutional law;* it becomes those, who may be disposed to resist the execution of

the laws in question, to ascertain what are their chances of escaping unharmed in running the gauntlet of such a judiciary as the nation is blessed with.

One liability, imposed by the act, (sec. 7,) is that any person, who shall in any way assist in the rescue, "shall forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost as aforesaid, to be recovered by action of debt," &c.

There is one consolation, in view of this liability, and that is, that in the suit for this $1000, the claimant will be under the necessity of proving his property in the fugitive; and this, (as is shown by Senator Mason's speech, before cited,) could be done in no case whatever.

I say the claimant will have to prove his property in the fugitive, because it is not clear that the act intends, (although at first blush such may be its apparent meaning,) that the judgment given by the court, judge, or commissioner, delivering the alleged slave to the claimant, shall be sufficient evidence, or even evidence at all, of such claimant's property in the slave, in a civil suit for damages for the loss of the slave. And in the absence of such clear intention, I apprehend no court would dare put such a construction upon the act, or allow such use to be made of that judgment. The right of action for damages, which is given to the master, is given him, not for the purpose of punishing those who rescue the alleged fugitive, (for that punishment is provided for by fine and imprisonment,) but to enable the owner to recover payment for the loss of his property. In such an action he is of course necessitated to prove, (and Congress have no power to make any law to the contrary,) that the man he claims as his property, is really his—because, in a free state certainly, every man is *prima facie* the owner of himself.*

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* In the case of Hill *v.* Low, the court held that under the law of 1793, the claimant, in a suit for the penalty, against a person for harboring, concealing, or rescuing a fugitive, was under the necessity of proving his property in the fugitive, and that the certificate of the magistrate was not proof. The reasons given for that opinion seem very satisfactory and conclusive, and to be as applicable to a case under the act of 1850 as under that of 1793.—4 *Washington C. C. Rep.* 327.

The claimant could recover payment for his slave but once, although an hundred or a thousand persons were engaged in the rescue; and these hundred or thousand persons could unite in the payment, thus making the burden a light one upon each individual.

As this action is given to the owner, to enable him to recover the value of his slave, and not as a penalty upon those who rescue him, the law is clearly unconstitutional in fixing that value at a specific sum. The value must be ascertained by a jury, if it exceed twenty dollars. Congress have as much right to say that, in case of any other injury done by one man to the property of another, the wrong-doer "shall forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars, (and no more,) to be recovered by action of debt," without regarding whether the injury were really $10, or $10,000, as to say the same in this case. The power of determining the amount of injury done by one man to the property of another, by violating a law of the United States, is a part of "the judicial power," and is vested solely in the courts, and Congress have no authority whatever to decide that question.

Furthermore, the law is also unconstitutional in authorizing the owner to recover the full value of the slave. It should only authorize him to recover the damages actually sustained by the rescue. The owner does not lose his property in his slave by having him taken out of his hands on a particular occasion. His property in him remains, and the law presumes that he can take his slave again at pleasure, as he could before the rescue. Because there has been one rescue, the law does not presume that the slave is forever lost to his owner. And the defendants would be entitled to prove that the slave was still within reach of the master, where his master might at any time retake him. And it would be no answer to this fact, to say, that if the slave were retaken, he would probably be rescued again. The law presumes nothing of that kind, and could not presume it, even though the slave had been seized by the owner, and rescued by the defendants, an hundred

times. The law would still presume that if the master were to take the slave again, he would be suffered to hold peaceable possession of him. Consequently the owner, in case of a rescue, is entitled to recover only the damages actually suffered by that particular rescue, and not the full value of the slave, as if he had been lost to him forever. And this suit for damages, being a "suit at common law," within the meaning of the constitution, must be tried by a jury; and the damages must be ascertained by a jury, instead of being fixed by statute.

If this view of the law be correct, the pecuniary liability incurred in rescuing a slave, would be very slight, so far as the right of the master to recover damages was concerned.*

The only other liability incurred in rescuing an alleged fugitive, is a liability to be indicted and tried criminally for the act, and if convicted, subjected to "a fine not exceeding one thousand dollars, and imprisonment not exceeding six months."

There are two chances of security against these punishments.

1. They can be inflicted only upon "indictment and conviction." There is a probability that a grand jury will not indict, for it is not their duty to do so, if they think the law, that has been resisted, is unconstitutional. A grand jury have the same right to judge of the law, as a traverse jury.

2. If an indictment be found, the jury who try that indictment, are judges of the law, as well as the fact. If they think the law unconstitutional, or even have any reasonable doubt of its constitutionality, they are bound to hold the defendants justified in resisting its execution.

From this right of the jury to judge of the law in all criminal cases, it follows that in all forcible collisions between the government and individuals, (as in the case of resistance to

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* If however, it should be held that the $1000, required to be paid to the claimant, is in the nature of a penalty, *in addition to the fine and imprisonment*, it follows that in a suit for that penalty, the jury will have a right to judge of the constitutionality of the law, as in case of an indictment.

the execution of a law,) the right of judging whether the government or the people are in the right, lies in the first instance, not with the government, or any permanent department of it, but with the people—that is, "*the country*," whom the jury represent; for the jury represent "the country," or the people, *as distinguished from the government.** The people, therefore, in establishing government, *with trial by jury*, do not surrender their liberties into the hands of the government to be preserved or destroyed, as the government shall please. But they retain them in their own hands, by forbidding the government to injure any one in his life, liberty, or property, without having first obtained the consent of "the country"—that is, of the people themselves—who are supposed to be fairly represented by a jury, taken promiscuously from the whole people, and therefore likely to embrace persons of all the varieties of opinion that are generally prevalent among the people.

Hence it follows that, under the trial by jury, no man can be punished for resisting the execution of any law, unless the law be so clearly constitutional, as that a jury, taken promiscuously from the mass of the people, will *all* agree that it is constitutional. But for some principle of this kind, by which the opinions of substantially the whole people could be ascertained, men, in agreeing to a constitution, would be liable to be entrapped into giving their consent to a government that would punish them for exercising rights, which they never intended to surrender. But so long as it rests with a jury, instead of the government, to say what are the powers of the government, and what the liberties of the people—and so long as juries are fairly selected by lot from the whole population, the presumption is that all classes of opinions will be represented in the jury, and every man may therefore go forward fearlessly in the exercise of what he honestly believes to be his rights, in the confidence that, if his conduct be called in question, there will be among his judges, (the jury,) some

* In all criminal cases, the jury are told that the defendant has "for trial, put him self upon the country, which country you are."

persons at least, whose judgments will correspond with his own.

And inasmuch as a single dissentient in the jury is sufficient to prevent a conviction, it follows that if the government exercise any powers except such as substantially the whole people intended it should exercise, it is liable to be resisted, without having any power to punish that resistance. It may indeed overcome that resistance and enforce the law, constitutional or unconstitutional, unless resisted by a force that is stronger than its own. But it cannot punish that resistance afterward, unless substantially the whole people, through a jury, agree that the law was constitutional.

But this right of a jury, in all criminal prosecutions, to judge of the constitutionality of the law that has been resisted, is not the whole of a jury's rights; they have the right to judge also of its *justice*. Juries are never sworn to try *criminal* cases "according to law." They are only sworn to "try *the issue* according to the evidence." The "issue" is *guilty* or *not guilty*. This issue is to be tried on the natural principles of justice, as those principles exist in the breasts of the jurors, and not according to any arbitrary standard which legislators may have attempted to set up. *Guilt* is an *intrinsic* quality of actions, and cannot be imparted to them by all the legislatures that ever assumed to exercise the power of converting justice into injustice, and injustice into justice. The question for a jury, in trying "the issue," then, is not simply whether the accused has been guilty *of* violating a law; but whether he has been guilty *in* violating it? And unless they *all* answer this last question in the affirmative, he cannot be convicted.

The trial by jury might safely be introduced into a despotic government, if the jury were to exercise no right of judging of the law, or the justice of the law.

If juries were to find men guilty, simply because the latter had exercised their natural rights in defiance of unjust laws, juries, instead of being, as they are wont to be called, "the palladium of liberty," would be the vilest tools of oppression

—the instruments of their own enslavements—for in condemning others for resisting injustice, at the hands of the government, they authorize their own condemnation for a similar cause. No honest man could ever sit on a jury, if he were required to find a man "guilty," and thus become accessory to his punishment, for doing an act, which was just in itself, but which the government, in violation of men's natural rights, had arbitrarily forbidden him to do.

Furthermore, a jury, before they can convict a man, must find that he acted with a *criminal intent*—for it is a maxim of law that there can be no crime without a criminal intent. There can be no criminal intent in resisting injustice. To justify a conviction, therefore, the law, *and the justice of the law*, must both be so evident as to make its transgression satisfactory proof of an evil design on the part of the transgressor.

Such are some of the principles of the trial by jury: and the effect of them is to subject the whole operations of the government, both as to their constitutionality and their justice, to the ordeal of a tribunal fairly representing the whole people, and thus to restrain the government within such limits as substantially the whole people, whose agent it is, agree that it may occupy. But for this restraint, our government, like all others, instead of being restricted to the accomplishment of such purposes as the whole people desire, would fall, as indeed it very often has fallen, into the hands of cliques and cabals, who make it, as far as possible, an instrument of plunder and oppression, for the gratification of their own avarice and ambition.

There is, therefore, substantial truth in the saying, which, we have been recently told,* "has, in England, become traditional, and drops from the common tongue, that 'the great object of King, Lords, and Commons, is to get twelve men into a jury box.'" And in this country, the great object of Presidents, Senators, and Representatives is the same. But such have been the ignorance and the frauds of legislators and judges, and such the ignorance of the people, on this point,

* By Hon. Horace Mann.

that juries have generally been merely contemptible tribunals, looking after facts only, and not after rights, and ready to obey blindly the dictation of legislatures and courts, and enforce any thing and every thing, which the permanent branches of the government should require them to enforce. And we now see the results of their degradation and submission, in the audacity of the legislature in passing such laws as those of 1793 and 1850, and in the conduct of the courts in sanctioning, as constitutional, the former of these laws, as they undoubtedly will sanction the latter, unless deterred by the intelligence and firmness of the people.

It is this intrusting of the liberties of the people, to the hands of the people—represented by a jury taken promiscuously from the mass of the people—instead of intrusting them to the government, which represents at most but a part, and generally a small part, of the people—that makes the trial by jury "the palladium of liberty." If governments were intrusted with authority to define the liberties of the people, they would of course say that the people had no liberties that could be exercised contrary to the will of the government. And if governments had authority to define their own powers, and to punish all who resisted their power as thus defined, all governments would declare themselves absolute of course. And the simple right to punish resistance, without getting the consent of the people in each individual case, would, of itself, make any government absolute; for the power to punish necessarily carries all other powers with it. The power to punish disobedience is the power that compels obedience. It is, in its very nature, an absolute and uncontrollable power. And if a government have this power, it is absolute of course. And oaths and parchments are things of no importance in such a case, for they are necessarily but straws in the way of a power that is otherwise unrestrained.

It is no argument to say that the constitution has provided a judicial department, with power extending to "all cases arising under the constitution and laws of the United States." The answer is, that this constitution has made juries a part of this judicial department, and given them special jurisdiction of

crimes, and made their acquittal final; and that it is only in cases of conviction that a question can be carried beyond them.

The *permanent* officers of this department—the judges, so called—by the very constitution of their office, are unfit to be trusted with any question arising between the government and the people, as to the powers of the former, and the liberties of the latter; for the judges receive their offices directly from those other departments of the government, and not from the people. They are also dependant upon those other departments for their salaries, and are amenable to them by impeachment. They are of course nothing but instruments in their hands, and have always proved themselves to be so. I think there is not to be found on record, either in our general or state governments, a single instance, in which the judiciary have ever held a law unconstitutional, that provided in any way for *punishing* the people for the exercise of their rights. The statute books of both the national and state governments have abounded, and still abound, with statutes creating odious and oppressive monopolies, infringing men's natural rights, violating the plainest principles of justice, having no authority in the constitutions under which they purport to be enacted, and providing fines and imprisonments for those who may transgress them; and yet, (so far as I am aware), no one of this long catalogue of enactments ever encountered the veto of the judiciary. I apprehend that the whole judiciary of this country, state and national, might be safely challenged to produce a single instance, in which they have ever vindicated a single principle of either natural or constitutional liberty, against the penal encroachments of the legislatures on which they were dependent. On the contrary, they have uniformly—probably without a solitary exception—proved themselves, in all questions of this nature, to be nothing but the willing instruments of usurpation and oppression. They do not accept their offices with any other intention than that of holding all laws constitutional, which they suppose the legislature will pass—for no-

body accepts an office, unless with the intention of being obedient to those, to whom they are amenable.*

The idea, so constantly asserted, that the *permanent* judiciary, the judges, have a right to decide all constitutional questions, *authoritatively for the people*, is one of those gross impostures, by which men have always been defrauded of their rights. There is not a syllable in the constitution, that makes a decision of the judiciary—of its own force, and without regard to its correctness—binding upon any body, either upon the executive, or the people. In the very nature of things, nothing but the *law* can be binding upon any one. If a judicial decision be according to law, it is binding; if not, not. An unconstitutional judicial decision is no more binding, than an unconstitutional legislative enactment—and a man has the same right to resist, by force, one as the other, and to be tried for such resistance by a jury, who judge of the law for themselves.

Suppose the judiciary, in a suit between two pretended mothers, for the custody of a child, should give the judgment of Solomon, that the child be cut in two, and a half given to each; does any one suppose the executive would be bound to carry the judgment into effect? or that the opinion is obligatory as an authority upon any body? Yet it would be as much binding as any other erroneous decision.

If a judicial decision contrary to the constitution, were binding simply because it were a judicial decision, the judiciary could constitutionally make themselves absolute sovereigns at once.

A judicial decision, as such, has therefore no *intrinsic* authority at all; its constitutional authority rests wholly upon its being in accordance with the constitution. And we can determine whether it be in accordance with the constitution, only by first determining the meaning of the constitution, independently of the decision, and then comparing the decision with it. If we take the decision as authority for the meaning of the

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* If judges were made amenable to the people by election, we might have more hope of their having some respect for the rights of the people.

constitution, all decisions will of necessity be constitutional, and the judges are of course, constitutionally speaking, absolute despots.

It is no argument, in answer to this view of the case, to say, that decisions may be so grossly and palpably unconstitutional as not to be binding; but that in all *doubtful* cases they are obligatory. The constitution knows nothing of doubtful cases. In its view decisions and laws are simply either constitutional or unconstitutional. It knows nothing of their being more or less grossly and palpably so. If they are constitutional, they are binding; if they are not constitutional, they are not binding, though their variation from the constitution be but the smallest that can be discovered.

The constitution does not assume that it *needs* any authoritative interpreter. It assumes that its meaning is known to the people who ordained and established it, just as all legal instruments assume that their true meaning is understood by the parties to them. The people, as parties to the constitution, would not be bound by it, unless they were presumed to understand it—for no one is bound by a contract, which he is not presumed to understand.

The constitution as much presumes that the people understand its own meaning, as it does that they understand a judicial opinion. It presumes itself to be as intelligible as the opinions of courts. It would be absurd for it to presume that courts would express its intentions more intelligibly than it has itself expressed them—for, in that case, the language of the courts would be more authoritative than the language of the constitution; they would consequently make the constitution whatever they should please to make it; and they would also make themselves whatever they should please to be. But the constitution has no such suicidal character as that. On the contrary, it presumes that the people are competent to understand both the meaning of the constitution and the meaning of the courts; and consequently that they are competent to determine whether the opinions and decisions of the courts cor-

respond with the constitution, and whether, therefore, their decisions are to be obeyed or resisted.

What, then, it may be asked, is the use of the judiciary, if it be not to decide doubts as to the meaning of the constitution? The answer is, that it is their office to try certain "cases," "controversies," and "suits," mentioned in the constitution. These cases are presumed to arise out of disagreements as to facts, or from the dishonesty of one or the other of the parties, and not from their ignorance of the law, (or constitution),—for every body is presumed to know the law, although all do not in fact know it—neither the people nor the courts. And the judiciary are to try these "cases," "controversies," and "suits,"—that is, they are to ascertain the facts, and determine the resulting rights of the parties—*by the standard of the constitution, as a known standard; a standard that is presumed to be known to both the parties, as well as to the courts.*

The judiciary are in a situation analagous to that of any other umpire, who should be agreed upon, for instance, by the parties in a controversy, to measure a certain commodity by a certain standard—as, for example, to measure certain cloth by a yard stick. The submission of this controversy to the umpire, implies that the parties, as well as the umpire, understand the length of the yard stick—but that they nevertheless disagree as to the true admeasurement of the cloth. They therefore agree to abide the decision of the umpire.

In the performance of his office, it becomes necessary for this umpire—for a guide to his own duty, and not for the information of the parties or the public,—to ascertain what is a yard stick. And if he honestly measure the cloth by a yard stick, the parties are bound by his admeasurement. But if this umpire, either from ignorance or design, measure the cloth by a stick, that is either more or less than a yard, calling such stick a yard stick, the admeasurement is not binding upon the parties —because the submission of the case to the umpire was made upon the express condition that the admeasurement should be made by a yard stick. And the party, who has been wronged

by the false admeasurement, has a right to resist the execution of the umpire's decree.

The case is the same with the judiciary. They are umpires, appointed to measure the rights of parties, *by a certain standard*, to wit, the constitution. This standardis presumed to be known to the parties, as well as to the umpires, (for all are presumed to know the law), although it may in fact be known to none of them. The umpires—in order to perform their own duty, and not for the information of the parties or the public,—must necessarily ascertain, if they can, what the constitution really is. But if, through ignorance or design, they put a false meaning upon the constitution—*thus adopting a false standard*—and then measure the rights of the parties by this false standard, the parties are not bound by their decision, because the submission was made to them only on the condition that their rights should be measured by that particular standard, the constitution—and not by any false standard which the umpires, through ignorance or design, might adopt. And the party, who is wronged by the decision, has a right to resist the execution of it, to the best of his power. And if tried criminally for such resistance, his triers (the jury) must judge whether the decision of the umpires was according to the standard agreed upon by the parties—that is, according to the constitution.

But it is thoroughly ridiculous to talk of these umpires having fixed or established the standard itself—that is, the meaning of the constitution—merely because, in a particular instance, they measured the rights of certain parties by the constitution. There would be as much reason in saying that the umpire, who measured the cloth by a yard stick, established the length of the yard stick by so doing, as to say that the judiciary establish the meaning of the constitution, whenever they pretend to measure rights by the constitution. Any thing they said or did in one instance, between certain parties, has no binding force, *of itself*, in any subsequent case between the same, or any other, parties. The standard, alone, or a true admeasurement by the standard alone, is binding in all cases. If the first admeasurement were correct, that admeasurement estab-

lished simply the rights measured by it. It did nothing towards *fixing the standard itself*, by which the rights were measured. And any subsequent correct admeasurement will, in like manner, establish the rights measured by it; but will do nothing towards fixing the standard itself. The standard itself needs not to be fixed, for it was fixed before any rights at all had been measured by it. But to say because one admeasurement has been made *thus*, therefore all future admeasurements must be made *thus*, is ridiculous. The admeasurements are all bound to be made correctly, according to the standard. But if one have been made wrong, that is no reason why all future admeasurements must be made wrong, nor why the people are bound to presume that all future admeasurements will be made wrong. Whether any admeasurement be made wrong, or not, each one must judge for himself, and resist the decision of the umpires at the peril of being tried for such resistance by a jury.

CHAPTER III.

Liability of United States Officers to be punished, under the State Laws, for executing the acts of 1793 *and* 1850.

If the laws of 1793 and 1850 are unconstitutional, they are *no laws*, in the view of the constitution; consequently they confer no authority on any one; and the United States judges, commissioners, marshals, &c., who may assist in sending men into slavery, in performance of them, are liable to be punished, under the State laws, as kidnappers, the same as they would have been if Congress had passed no act on the subject.

The constitution contemplates that all officers of the United States, except Senators and Representatives, may be punished for any crimes done under color of their office; for it declares, that, in addition to impeachment, they "shall be liable, and subject to, indictment, trial, judgment, and punishment according to law." (*Art.* 1, *Sec.* 3, *Ch.* 7).

If any one of these officers were to commit murder, rape, arson, theft, or any other crime, either under color of his office, or otherwise, his office is no protection to him against the laws of the State. And it is the same in the case of kidnapping, as it would be in the case of any other crime.

The only question, that can be raised in their defence, is, whether they are bound to know that an act, that has passed through the regular forms of being enacted, is unconstitutional?

This question is answered by the simple principle, that every body is bound to know the law. If that obligation be imperative upon any one, it is imperative upon those who administer the law. The constitution is the fundamental, the paramount law, and all officers of the government are sworn to support it. Of course they are presumed to know it, and bound to know it, else their oaths to support it would be but nonsense.

If they are bound to know the constitution itself, they are of course bound to know whether an act, that has passed Congress, be in conformity with it,—else in executing the act they would be liable to commit a breach of their oaths to support the constitution.

They are also sworn to administer and execute the *laws* of the United States. Unless they were presumed to know, and bound to know, what are, and what are not, laws of the United States, within the meaning of the constitution, this oath also is an absurd one.

If the judges or executive officers were bound to consider every act, that may pass Congress, a constitutional one—that is, a *law*, within the meaning of the constitution,—their oath to support the constitution, and their oath to support the laws, would come in conflict with each other, whenever an unconstitutional act was passed.

Indeed we all know that the *judiciary* are not bound to consider an act of congress constitutional; and if the judiciary are not, no other branch of the government is, for each department of the government judges of the constitution for itself,

independently of the others,—else no one branch would be any restraint upon the others, and the whole object of having the government divided into different departments, to act as checks upon each other, would be lost. Every law, therefore, must pass the ordeal of all branches of the government, (if brought before them), before it can be executed.

The constitution (Art. 1, Sec. 6), protects those who *make* an unconstitutional law,—that is, "the Senators and Representatives,"—from any legal responsibility for the act, by providing that "for any speech or debate in either house, they shall not be questioned in any other place." Unless, therefore, those who *execute* an unconstitutional law, can be held responsible for their acts, there is no crime, however contrary to the constitution, which congress may not authorize to be committed with impunity; and all ideas of there being any legal and practical restraints upon the government of the United States, short of a resort to force, are fallacious.

For all acts, therefore, *that are criminal in themselves*, the officers of the United States are liable to be tried under the State laws, and punished, unless they show that the acts were done in pursuance of some *constitutional* law of the United States. And no presumption in favor of the constitutionality of the law can be allowed, if the acts done are criminal in themselves; for the presumption must always be that the constitution authorizes nothing criminal in itself.

In the trial of an United States officer for a crime committed under color of an unconstitutional law of Congress, the question whether the law were constitutional, would be a question to be judged of, in the first instance, by a jury. If they held the law unconstitutional, and convicted the defendant, he would have a right of appeal to the Supreme Court of the United States. But corrupt as that court is, they would rarely dare, against the general voice of the juries of the country, to hold a law constitutional, that licensed crimes against the people.

In saying that the officers of the government are bound to know the law, (and consequently to know whether an act of

congress be constitutional), I am only laying down the general principle of criminal law—a principle, which the government usually enforces without mercy, against private individuals, and which is certainly as sound when applied to an officer of the government, as when applied to private persons.

But in truth the maxim, that ignorance of the law excuses no one, is a very absurd and unjust one, *if applied without any limitation*, inasmuch as it would nullify the first principle of criminal law, that there can be no crime without a criminal intent. The rule is also one, which judges themselves could not live under, for they are every day committing errors, which would be crimes, if ignorance were not a legal excuse.

But the rule *is* a sound one, so far as it is necessary to compel all men, officers of the government, as well as private persons, to use all reasonable and proper diligence to ascertain the law. And where a law requires any thing, *that is criminal in itself*, an officer is bound to act with far greater caution, and to use far greater diligence, to ascertain whether it be constitutional, than he is where the act required to be done is right in itself—because the presumption of law is always in favor of justice. Nothing, therefore, but entirely clear and conclusive proof of the constitutionality of a law, ought to justify an officer in executing it, if it require him to do any thing that is intrinsically criminal.

This liability of the officers of the United States, to the criminal laws of the states, is no hardship upon them—for it applies only in cases where the acts done by them are *mala in se, criminal in themselves.* And they, like other men, can be convicted only where the jury find that they either *knew* that the acts done by them were intrinsically criminal, or were *culpably* ignorant of their character in that respect. Now, it would really be no hardship that a man should be punished for an act, that he knew to be to be intrinsically criminal, even though it were authorized by all the governments in the world; because governments have no rightful power to authorize such acts, and their authority is, morally speaking, no justification to the agent. An officer of the government, who performs an act criminal in itself, does

it voluntarily for hire, (for he is at liberty to resign his office); and he has no more moral excuse for the act than any other man has, who perpetrates a crime for pay. It is therefore a special grace, and bad enough in principle, to allow officers of the government, in any case, to set up a law of the government, as an excuse for a known crime. If this grace be extended so as to allow an unconstitutional law, (which is really no law at all), to be used as a justification for crimes, we in reality license the government to perpetrate all crimes at pleasure.

The question now arises, whether these fugitive slave laws are so plainly unconstitutional, as to afford no legal excuse for those who execute them?

In the first place, there would seem to be no doubt, so far as the *commissioners* are concerned. The acts required of them are *judicial* acts; yet they plainly are not judicial officers, within the meaning of the constitution. And inasmuch as the act of delivering a man into bondage is intrinsically a crime, they are inexcusable for assuming judicial powers for the purpose of executing it.

The objection which lies against the commissioners, on account of the tenure of their offices, and their want of fixed salaries, does not apply to judges of the established courts. But all the other grounds of unconstitutionality are as strong in the case of the judges as in the case of the commissioners. And the question is, whether an act of Congress, requiring that a man —found in a free state, and *prima facie* a free man and citizen of the United States—be delivered into slavery; without a trial by jury; on *ex parte* evidence; and a part of that *ex parte* evidence taken in another state, by a *state* "court, or judge thereof in vacation," and made binding upon the United States court that delivers him up; denying him the right to give his own testimony; and depriving him, by "a summary manner" of proceeding, of all opportunity of procuring other testimony in his favor; be so plainly unconstitutional, that a jury would be bound to hold a judge guilty of a criminal intent in executing it?

That the act of delivering a man into slavery is intrinsically a crime of a high grade no one can deny. The presumption of law therefore is, that the constitution gives no authority for it. The burden is therefore upon the judge to show that the acts of Congress are so clearly constitutional, as to overcome this presumption, and justify the act. If he can show this, he is entitled to the benefit of it; otherwise not.

To illustrate the principles here maintained, let us suppose that Congress pass an act for the trial and punishment of traitors; providing that a person accused of treason, may be tried and convicted wholly on *ex parte* evidence; that *ex parte* evidence, taken in another state than the one in which he is tried, and before "any (state) court of record, or judge thereof in vacation," "shall be held and taken (by the United States court) to be full and conclusive evidence of the treason," leaving nothing but the identity of the individual to be proved on the trial; enacting also that he shall be tried "forthwith," after being arrested, and "in a summary manner," that will allow him no opportunity to procure evidence in his defence; that he shall not have a trial by jury, as the constitution requires that he shall have; but that he shall be tried by a single judge; (and that judge, it may be, not one having a fixed salary, and therefore free from any pecuniary interest in his conviction, but one depending solely upon fees for his pay, and who is to receive ten dollars if he convict the accused, and sentence him to death, and but five dollars if he acquit him); enacting further that, in case of conviction, no appeal shall be allowed to a higher court on any question of either law or fact; that no writ of *habeas corpus* shall be issued in his behalf; but that, on the contrary, the judge, that convicted him, shall at once issue his warrant to the marshal, requiring him, under penalty of a thousand dollars, to hang the man immediately before he can be rescued by the people; suppose all this, and does any one doubt that the judge, marshal, and every body else who should assist in executing the law, would be bound to know that such a law was unconstitutional, and would therefore be guilty of murder in ex-

ecuting it? and liable to be punished as murderers under the laws of the state, in which the transaction occurred? Yet what difference is there, in principle, between that case, and a case of kidnapping under the statutes we have been discussing? If there be any difference, sufficient to constitute a valid excuse, the government officers must go acquitted of their crime; otherwise they must be convicted.

The same principles of responsibility to the criminal laws of a state, that apply to judges, commissioners, and marshals, apply also to the militia, who turn out, at the command of the president, to assist in enforcing an unconstitutional law. If the militia are bound to know nothing of the constitutionality of a law of Congress, or to know no law but the orders of a superior officer, we live under a military despotism.

In addition to these liabilities to the criminal law, the officers of the United States are liable to civil suits for damages, if they execute an unconstitutional law of Congress to the injury of private persons. And judgments recovered in the state courts could be invalidated, if at all, only on an appeal to the supreme court of the United States.

Finally. If these fugitive slave laws are unconstitutional, the delivery of persons into slavery under color of them, is a crime; and the state magistrates, on application to them, are bound to place the officers of the United States under bonds to keep the peace in this particular. If those officers then proceed, contrary to the obligation of their bonds, to execute the law, their bonds are liable to be enforced, unless invalidated on an apppeal to the supreme court of the United States.

Unless these principles be sound, it is manifest that the states have no power to protect their citizens against any crimes, which Congress, by unconstitutional enactments, may please to license to be committed against them.

APPENDIX,

A

Neither the Constitution, nor either of the acts of Congress of 1793 *or* 1850, *requires the surrender of Fugitive Slaves.*

In the preceding chapters, it has been admitted, for the sake of the argument, that the constitution, and the acts of Congress of 1793 and 1850, require the delivery of Fugitive Slaves. But such really is not the fact. Neither the constitutional provision, nor either of said acts of congress, uses the word slave, nor slavery, nor any language that can *legally* be made to apply to slaves. The only "person" required by the constitution to be delivered up, is described in the constitution as a "person *held* to service or labor in one state, under the laws thereof." This language is no legal description of a slave, and can be made to apply to a slave only by a violation of all the most imperative rules of interpretation, by which the meaning of all legal instruments is to be ascertained.

The word "held" is a material word in this description. Its legal meaning is synonymous with that of the words "bound," and "obliged." It is used in bonds, as synonymous with those words, and in no other sense. It is also used in laws and other legal instruments. *And its legal meaning is to describe persons held by some legal contract, obligation, duty, or authority, which the law will enforce.* Thus, in a bond, a man acknowledges himself "*held*, and firmly bound and obliged" to do certain things mentioned in the bond,—and the law will compel a fulfillment of the obligation. The laws "hold" men to do various things; and by holding them to do those things, is meant that the laws will compel them to do them. Wherever a person is described in the laws as being "*held*" *to do any thing*,—as to render "service or labor," for example,—the legal meaning *invariably* is that he is held by some *legal* contract, obligation, duty, or authority, which the laws will enforce,—(either specifically, or by compelling payment of damages for non-performance). I presume no single instance can be found, in any of the laws of this country, since its first settlement, in which the word "held" is used in any other than this legal sense, when used to describe a person who is "*held*" *to do any thing*, "under the laws." And such is its meaning, *and its only meaning*, in this clause of the constitution. If there could be a doubt on this point, that doubt would be removed by the additional words, "under the laws," and the word "due" as applied to the "service or labor," to which the person is "held."

Now a slave is not "held" by any legal contract, obligation, duty, or authority, which the laws will enforce. He is "held" only by brute force. One person beats another until the latter will obey him, work for him, if he require it, or do nothing if he require it. This is slavery, and the whole of it. This is the only manner in which a slave is "*held* to service or labor."

The laws recognize no obligation on the part of the slave to labor for or serve his master. If he refuse to labor, the law will not interfere to compel him. The master must do his own flogging, as in the case of an ox or a horse. The laws take no more cognizance of the fact whether a slave labors or not, than it does of the fact whether an ox or a horse labors.

A slave then is no more "held" to labor, in any *legal* sense, than a man would be in Massachusetts, whom another person should seize and beat until he reduced him to subjection and obedience. If such a man should escape from his oppressor, and take refuge in Carolina, he could not be claimed under this clause of the constitution, because he would not be "held" in any *legal* sense, (that is, by any legal contract, obligation, duty, or authority), but only by brute force. And the same is the case in regard to slaves. Senator Mason of Virginia, in the extract before given from his speech, virtually admits this to be the fact.*

It is an established rule of legal interpretation, that a word used in laws, to describe *legal* rights, must be taken in a *legal* sense. This rule is as imperative in the interpretation of the constitution, as of any other legal instrument. To prove this, let us take another example. The constitution (Art. 1, Sec. 6), provides that "for any speech or debate in either house, they (the Senators and Representatives) *shall not be questioned* in any other place." Now this provision imposes no restriction whatever upon the Senators and Representatives being "questioned for any speech or debate," by any body and every body, who may please to question them, or in any and every place,—with this single exception, that they must not "be questioned" *legally*,—that is, they must not be held to any *legal* accountability.

It would be no more absurd to construe this provision about *questioning* Senators and Representatives, so as to make it forbid the people, in their private capacity, to ask any questions of their Senators and Representatives, on their return from Congress, as to their doings there, instead of making it apply simply to a *legal* responsibility, than it is to construe the words "held to service or labor," as applied to a person held simply by brute force, (as in the case supposed in Massachusetts), instead of persons held by some legal contract, obligation, or duty, which the law will enforce.

As the slave, then, is "held to service or labor," by no contract, obligation, or duty, which the law will enforce, but only by the brute force of the master, the provision of the constitution in regard to "persons held to service or labor" can have no more legal application to him, than to the person supposed in Massachusetts, who should at one time be beaten into obedience, and afterwards escape into Carolina.

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* I am confident that Mr. Calhoun made the same admission within two or three years last past, but I have not the paper containing it at hand.

The word "*held*" being, in law, synonymous with the word "*bound*," the description, "person *held* to service or labor," is synonymous with the description in another Section, (Art. 1, Sec. 2), to wit, "those *bound* to service for a term of years." The addition, in the one case, of the words "for a term of years," does not alter the meaning, for it does not appear that, in the other case, they are "held" beyond a fixed term.

In fact, every body, courts and people, admit that "persons *bound* to service for a term of years," as apprentices and other indented servants, are to be delivered up under the provision relative to "persons *held* to service or labor." The word "*held*," then, is regarded as synonymous with "*bound*," whenever it is wished to deliver up "persons *bound* to service." If, then, it be synonymous with the word "*bound*," it applies only to persons who are "*bound*," in a *legal* sense,—that is, by some *legal* contract, obligation, or duty, which the law will enforce. The words cannot be stretched beyond their *necessary* and proper *legal* meaning; because all legal provisions in derogation of liberty must be construed strictly. The same words that are used to describe a "person held to service or labor," by a *legal* contract, or obligation, certainly cannot be legally construed to apply also to one who is "held" only by private violence, and brute force.

Mr. Webster, in his speech of March 7th, 1850, admits that the word "held" is synonymous with the word "bound," and that the language of the constitution itself contains no requirement for the surrender of fugitive slaves. He says—

"It may not be improper here to allude to that—I had almost said celebrated—opinion of Mr. Madison. *You observe sir, that the term slavery is not used in the constitution. The constitution does not require that fugitive slaves shall be delivered up; it requires that persons bound to service in one state, and escaping into another, shall be delivered up.* Mr. Madison opposed the introduction, of the term slave or slavery into the constitution; for he said he did not wish to see it recognized by the constitution of the United States of America that there could be property in men."

Had the constitution required only that "persons *bound* to service or labor," should be delivered up, it is evident that no one would claim that the provision applied to slaves. Yet it is perfectly evident also that the word "held" is simply synonymous with the word "bound."

One can hardly fail to be astonished at the ignorance, fatuity, cowardice, or corruption, that has ever induced the north to acknowledge, for an instant, any constitutional obligation to surrender fugitive slaves.

The Supreme Court of the United States, in the Prigg case, (the first case in which this clause of the constitution ever came under the adjudication of that court), made no pretence that the *language itself* of the constitution afforded any justification for a claim to a fugitive slave. On the contrary, they made the audacious and atrocious avowal, that for the sole purpose of *making* the clause apply to slaves, they would disregard,—as they acknowledged themselves obliged to disregard,—all the primary, established, and imperative rules of legal interpretation, *and be governed solely by the history of men's intentions, outside of the constitutions.* Thus they say:

"Before, however, we proceed to the points more immediately before us, it may be well,—*in order to clear the case of difficulty*,—to say, that in the exposition of this part of the constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature. It will, indeed, probably, be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known *historical* fact that many of its provisions were matters of compromise of opposing interests and opinions; *that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses*. And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of *contemporary history*; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. * * * * *Historically*, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude." 16 *Peters*, 610-11.

Thus it will be seen, that on the strength of *history alone*, they *assume* that "*many of the provisions of the constitution were matters of compromise*," (that is, in regard to slavery); but they admit that the words of those provisions cannot be made to express any such compromise, if they are interpreted according to any "*uniform rule of interpretation*," or "*any rules of interpretation of a more general nature*," than the mere history of those particular clauses. Hence, "*in order to clear the case of (that) difficulty*," they conclude that "*perhaps the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force*, consistent with their legitimate meaning, *as may fairly secure and attain the ends proposed.*"

The words "*consistent with their legitimate meaning*," contain a deliberate falsehood, thrown in by the court from no other motive than the hope to hide, in some measure, the fraud they were perpetrating. If it had been "*consistent with the legitimate meaning of the words*" of the clause, to apply them to slaves, "there would have been no necessity for discarding, as they did, all the authoritative and inflexible rules of legal interpretation, and resorting to *history* to find their meaning. They discarded those rules, and resorted to history, to make the clause apply to slaves, for no other reason whatever, than that such meaning was *not* "consistent with the legitimate meaning of the words." It is perfectly apparent that the moment their eyes fell upon the "words" of the clause, they all saw that they contained no legal description of slaves.

Stripped, then, of the covering, which that falsehood was intended to throw over their conduct, the plain English of the language of the Court is this,—that *history* tells us that certain clauses of the constitution were intended to recognize and support slavery; but inasmuch as such is not the legal meaning of the words of those clauses, if interpreted by the established rules of interpretation, we will, "*in order to clear the case of (that) difficulty*," just discard those

rules, and pervert the words so as to *make* them accomplish whatever ends *history* tells us were intended to be accomplished by them.

It was only by such a naked and daring fraud as this, that the court could make the constitution authorize the recovery of fugitive slaves.

And what were the rules of interpretation, which they thus discarded, "in order to clear the case of difficulty," and make the constitution subserve the purposes of slavery? One of them is this, laid down by the Supreme Court of the United States:

"The intention of the instrument must prevail; *this intention must be collected from its words.*" 12 *Wheaton*, 332.

Without an adherence to this rule, it is plain we could never know what was, and what was not, the constitution.

Another rule is that universal one, acknowledged by all courts to be imperative, *that language must be construed strictly in favor of liberty and justice.*

The Supreme Court of the United States have laid down this rule in these trong terms.

"Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects."

United States vs. Fisher, 2 *Cranch*, 390.

Story delivered this opinion of the court, (in the Prigg case), discarding all other rules of interpretation, and resorting to history to make the clause apply to slaves. And yet no judge has ever scouted more contemptuously than Story, the idea of going out of the words of a law, or the constitution, and being governed by what history may say were the intentions of the authors. He says,

"Such a doctrine would be novel and absurd. It would confuse and destroy all the tests of constitutional rights and authorities. Congress could never pass any law without an inquisition into the motives of every member; and even then they might be re-examinable. Besides, what possible means can there be of making such investigations? The motives of many of the members may be, nay must be, utterly unknown, and incapable of ascertainment by any judicial or other inquiry; they may be mixed up in various manners and degrees; they may be opposite to, or wholly independent of each other. The constitution would thus depend upon processes utterly vague, and incomprehensible; and the written intent of the legislature upon its words and acts, the *lex scripta*, would be contradicted or obliterated by conjecture, and parol declarations, and fleeting reveries, and heated imaginations. No government on earth could rest for a moment on such a foundation. It would be a constitution of sand, heaped up and dissolved by the flux and reflux of every tide of opinion. Every act of the legislature, (and for the same reason also every clause of the constitution), must therefore be judged of from its objects and intent, as they are embodied in its provisions." 2 *Story's Comm.*, 534.

Also he says,

The constitution was adopted by the people of the United States; and it was submitted to the whole, upon a just survey of its provisions, as they stood in the text itself. * * Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favor. And there can be no certainty, either that the different state conventions, in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a

single state convention, the same reasoning prevailed, with a majority, much less with the whole, of the supporters of it. * * It is not to be presumed that even in the convention which framed the constitution, from the causes above mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself; and the judgment of no one could, or ought to be, conclusive upon that of others. * * *Nothing but the text itself was adopted by the people.* * * *Is the sense of the constitution to be ascertained, not by its own text, but by the* 'probable meaning,' to be gathered by conjectures from scattered documents, from private papers, from the table-talk of some statesman, or the jealous exaggerations of others? Is the constitution of the United States to be the only instrument, which is not to be interpreted by what is written, but by probable guesses, aside from the text? What would be said of interpreting a statute of a state legislature, by endeavoring to find out, from private sources, the objects and opinions of every member; how every one thought; what he wished; how he interpreted it? Suppose different persons had different opinions, what is to be done? Suppose different persons are not agreed as to the 'probable meaning' of the framers, or of the people, what interpretation is to be followed? These, and many questions of the same sort, might be asked. *It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text, but the words are to be bent and broken by the 'probable meaning' of persons, whom they never knew, and whose opinions, and means of information, may be no better than their own? The people adopted the constitution, according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men.*"

1 *Story's Comm. on Const.*, 387 *to* 392.

And Story has said much more of the same sort as to the absurdity of relying upon "history" for the meaning of the constitution.

It is manifest that if the meaning of the constitution is to be warped in the least, it may be warped to any extent, on the authority of history; and thus it would follow that the constitution would in reality be *made* by the historians, and not by the people. It would be impossible for the people to make a constitution, which the historians might not change at pleasure, by simply asserting that the people intended thus or so.

But, in truth, Story and the court, in saying that history tells us that the clause of the constitution in question, was intended to apply to fugitive slaves, are nearly as false to the history of the clause, as they are to its law.

There is not, I presume, a word on record, (for I have no recollection of having ever seen or heard of one), that was uttered either in the national convention that framed the constitution, or in any *northern* state convention that ratified it, that shows that, *at the time the constitution was adopted*, any *northern* man had the least suspicion that the clause of the constitution, in regard to "persons held to service or labor," was ever to be applied to slaves.

In the national convention, "Mr. Butler and Mr. Pinckney moved to require 'fugitive *slaves* and *servants* to be delivered up like criminals.'" "Mr. Sherman saw no more propriety in the public seizing and surrendering a *slave or servant*, than a horse." (*Madison papers*, 1447–8.)

In consequence of this objection, the provision was changed, and its language, as it now stands, shows that the claim to the surrender of *slaves* was abandoned, and only the one for *servants* retained.*

* *Servants* were, at that time, a very numerous class in all the states; and there were many laws respecting them, all treating them as a distinct class from slaves.

It does not appear that a word was ever uttered, *in the national convention*, to show that any member of it imagined that the provision, *as finally agreed upon*, would apply to slaves.

But after the national convention had adjourned, Mr. Madison went home to Virginia, and Mr. Pinckney, to South Carolina, and in the *State* conventions of those states, set up the pretence that the clause was intended to apply to slaves. I think there is no evidence that any other southern member of the national convention followed their example. In North Carolina, Mr. Iredell, (not a member of the national convention), said the provision was intended to refer to slaves; but that "The northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned."

I think the declarations of these three men, Madison, Pinckney, and Iredell, are all the "*history*" we have, that even *southern* men, *at that time*, understood the clause as applying to slaves.

In the *northern* conventions no word was ever uttered, so far as we have any evidence, that any man dreamed that this language would ever be understood as authorizing a claim for fugitive slaves. It is incredible that it could have passed the northern conventions without objections, (indeed it could not have passed them at all), if it had been understood as requiring them to surrender fugitive slaves; for, in several of them, it was with great difficulty that the adoption of the constitution was secured, when no such objection was started.

The construction, placed upon the provision at the present day, is one of the many frauds which the slaveholders, aided by their corrupt northern accomplices, have succeeded in palming off upon the north. In fact the south, in the convention, as it has ever done since, acted upon the principle of getting by fraud, what it could not openly obtain. It was upon this principle that Mr. Madison acted when he said that they ought not to admit, *in the constitution*, the idea that there could be property in man. He would not admit that idea, *in the constitution itself;* but he immediately went home and virtually told the State convention that that was the meaning which he intended to have given to it in practice. He knew well that if that idea were admitted in the instrument itself, the north would never adopt it. He therefore conceived and adhered to the plan of having the instrument an honest and free one in its terms, to secure its adoption by the north, and of then trusting to the fraudulent interpretations that could be accomplished afterwards, to make it serve the purposes of slavery.

Further proof of his fraudulent purpose, in this particular, is found in the fact that he wrote the 42d number of the Federalist, in which he treats of "the powers which provide for the harmony and proper intercourse among the states." But he makes no mention of the surrender of fugitives from "service or labor," as one of the means of promoting that "harmony and proper intercourse." He did not then dare say to the *north* that the south intended ever to apply that clause to slaves.

But it is said that the passage of the act of 1793, shows that the north understood the constitution as requiring the surrender of fugitive slaves. That act is supposed to have passed without opposition from the north; and the reason

was that it contained no authority for, or allusion to, the surrender of fugitive *slaves;* but only to fugitives from *justice*, and "persons held to service or labor." The south had not at that time become sufficiently audacious to make such a demand. And it was twenty-six years, so far as I have discovered, (and I have made reasonable search in the matter), after the passage of that act, before a slave was given up, *under it*, in any *free* state, or the act was acknowledged by the supreme court of any *free* state, to apply to slaves.

In 1795, two years after the passage of the act of congress, and after the constitution had been in force six years, a man was tried in the supreme court of Pennsylvania, on an indictment, under a statute of the state, against seducing or carrying negroes or mulattoes out of the state with the intention to sell them, or keep them, as slaves.

"Upon the evidence, in support of the prosecution, it appeared that negro Toby had been brought upon a temporary visit to Philadelphia, as a servant in the family of General Sevier, of the state of Virginia; that when General Sevier proposed returning to Virginia, the negro refused to accompany him"—but was afterwards *forcibly* carried out of the state. It appeared also in the evidence, that it was *proposed*, by Richards, the defendant, that the negro be *enticed* into New Jersey, (a slave state), and there seized and carried back to Virginia.

"The evidence, on behalf of the defendant, proved that Toby was a slave belonging to the father of General Sevier, who had lent him to his son, merely for the journey to Philadelphia."

The defendant was found *not guilty*, agreeable to the charge of the Chief Justice; and what is material is, that the case was tried wholly under the laws of Pennsylvania, which permitted any traveller, who came into Pennsylvania, upon a temporary excursion for business or amusement, to detain his slave *for six months*, and entitled him to the aid of the civil police to secure and carry him away. *Republica vs. Richards* 2 *Dallas* 224.

Not one word was said, by either court or counsel, of the provision of the United States constitution, in regard to "persons held to service or labor," or of the act of 1793, as having any application to slaves, or as giving any authority for the recovery of fugitive slaves. Neither the constitution, nor the act of Congress was mentioned in connection with the subject.

Is it not incredible that this should have been the case, if it had been understood, at that day, that either the constitution, or the act of 1793, applied to slaves?

Would a man have used force in the case, and thus subjected himself to the risk of an indictment under the state laws? or would there have been any proposition to entice the slave into a slave state, for the purpose of seizing him, if it had been understood that the laws of the United States were open to him, and that every justice of the peace (as provided by the act of 1793) was authorized to deliver up the slave?

It cannot reasonably be argued that it was necessary to use force or fraud to take the slave back, for the reason that he had been *brought*, instead of having *escaped*, into Pennsylvania, for that distinction seems not to have been thought of until years after. The first mention I have found of it was in 1806.

Butler vs. Hopper, 1 *Washington C. C. R.* 499.

In 1812 it was first acknowledged by the supreme court of New York, that the act of 1793, applied to slaves, although no slave was given up at the time. But New York then had slaves of her own.

Glen vs. Hodges, 9 *Johnson* 67.

In 1816 the supreme court of Pennsylvania first acknowledged that the constitution and the act of 1793 applied to slaves. But no slave was then given up. *Commonwealth vs. Holloway*, 2 *Sargent & Rawle* 305.

In 1823 the supreme court of Massachusetts first acknowledged that the constitutional provision in regard to "persons held to service or labor" applied to slaves. *Commonwealth vs. Griffith*, 2 *Pickering* 11.

Few, if any, slaves have ever been given up under the act of 1793, in the free states, until within the last twenty or thirty years. And that fact furnishes ground for a strong presumption that during the first thirty years after the constitution went into operation, it was not generally understood, in the free states, that the constitution required the surrender of fugitive slaves.

But it is said that the ordinance of 1787, passed contemporaneously with the formation of the constitution, requires the delivery of fugitive slaves, and that the constitution ought to be taken in the same sense. The answer to this allegation is that the ordinance does *not* require the delivery of fugitive slaves, but only of persons "from whom labor or service is lawfully claimed." This language certainly is no legal description of a slave.

But beyond, and additional to, all this evidence, that the constitution does not require the surrender of fugitive slaves, is the conclusive and insuperable fact, that there is not now, nor ever has been, any legal or constitutional slavery in this country, from its first settlement. All the slavery that has ever existed, in any of the colonies or states, has existed by mere toleration, in defiance of the fundamental constitutional law.

Even the statutes on the subject have either wholly failed to declare who might, and who might not, be made slaves, or have designated them in so loose and imperfect a manner that it would probably be utterly impossible, at this day, to prove under those statutes, the slavery of a single person now living. Mr. Mason admits as much in the extracts already given from his speech.

But all the statutes, on that subject, whatever the terms, have been unconstitutional, whether passed under the colonial charters, or since under the state governments. They were unconstitutional under the colonial charters, because those charters required the legislation of the colonies to "be conformable, as nearly as circumstances would allow, to the laws, customs, and rights of the realm of England." Those charters were the fundamental constitutions of the colonies, and of course made slavery illegal in the colonies—inasmuch as slavery was inconsistent with the "laws, customs, and rights of the realm of England."*

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* Washburn, in his "Judicial History of Massachusetts," (p. 202), says,

"As early as 1770, and two years previous to the decision of Somersett's case so famous in England, the right of a master to hold a slave had been denied, by the Supe-

There was therefore no legal slavery in this country, so long as we were colonies—that is, up to the time of the revolution.

After the Declaration of Independence, new constitutions were established in eleven of the states. Two went on under their old charters. Of all the new constitutions, that were in force at the adoption of the constitution of the United States, in 1789, not one authorized, recognized, or sanctioned slavery.* *All the recognitions of slavery, that are now to be found in any of the state constitutions, have been inserted since the adoption of the constitution of the United States.*

There was therefore no legal or constitutional slavery, in any of the states, up to the time of the formation and adoption of the constitution of the United States, in 1787 and 1789.

There being no legal slavery in the country, at the adoption of the constitution of the United States, all "the people of the United States" become legally parties to that instrument, and of course members of the United States government, by its adoption. The constitution itself declares that "We the people of the United States * * do ordain and establish this constitution." The term "people" of necessity includes the whole people; no exception being made, none can be presumed—for such a presumption would be a presumption against liberty.

After "the people" of the whole country had become parties to the constitution of the United States, their rights as members of the United States government were secured by it, and they could not afterwards be enslaved by the state governments—for the constitution of the United States is "the supreme law," (operating "directly on the people and for their benefit," say the supreme court, 4 *Wheaton* 404–5), and necessarily secures to *all* the people in-

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rior Court of Massachusetts, and upon the same grounds, substantially, as those upon which Lord Mansfield discharged Somersett, when his case came before him. The case here alluded to, was James vs. Lechmere, brought by the Plaintiff, a negro, against his master to recover his freedom."

* Perhaps it may be claimed by some that the constitution of South Carolina was an exception to this rule. By that constitution it was provided that the qualifications of members of the Senate and House of Representatives "*shall be the same as mentioned in the election act.*"

"The election act" was an act of the Provincial Assembly passed in 1759, which provided that members of the assembly "shall have in this province a settled plantation or freehold estate of at least five hundred acres of land, *and twenty slaves.*"

But this act was necessarily void, so far as the requirement in regard to slaves was concerned, because slavery being repugnant to the laws of England, it could have no legal existence in the colony, which was restricted from making any laws except such as were conformable, as nearly as circumstances would allow, to the laws, statutes, and rights of the realm of England.

This part of the act, then, being void at the time it was passed, and up to the time of the adoption of the constitution of the State, the provision in that constitution could not legally be held to give force *to this part of the act.* Besides, there could be no slaves, *legally speaking*, in 1778, for the act to refer to.

dividually all the rights it intended to secure to any; and these rights are such as are incompatible with their being enslaved by subordinate governments.

But it will be said that the constitution of the United States itself recognizes slavery, to wit, in the provision requiring "the whole number of *free* persons" and "three fifths of all other persons" to be counted in making up the basis of representation and taxation. But this interpretation of the word "free" is only another of the fraudulent interpretations, which the slaveholders and their northern accomplices have succeeded in placing upon the constitution.

The legal and technical meaning of the word "free," as used in England for centuries, has been to designate a native or naturalized member of the state, as distinguished from an alien, or foreigner not naturalized. Thus the term "*free* British subject" means, not a person who is not a slave, but a native born, or naturalized subject, who is a member of the state, and entitled to all the rights of a member of the state, in contradistinction to aliens, and persons not thus entitled.

The word "free" was used in this sense in nearly or quite all the colonial charters, the fundamental constitutions of this country, up to the time of the revolution. *In* 1787 *and* 1789, *when the United States constitution was adopted, the word "free" was used in this political sense in the constitutions of the three slaveholding states, Georgia, South Carolina, and North Carolina. It was also used in this sense in the articles of Confederation.**

The word "*free*" was also used in this political sense in the ordinance of 1787, in four different instances, to wit, three times in the provision fixing the basis of representation, and once in the article of compact, which provides that when the states to be formed out of the territory should have sixty thousand *free* inhabitants, they should be entitled to admission into the Confederacy.

That the word "free" was here used in its political sense, and not as the correlative of slaves, is proved by the fact that the ordinance itself prohibited slavery in the territory. It would have been absurd to use the word "free" as the correlative of slaves, when slaves were to have no existence under the ordinance.

This political meaning, which the word "free" had borne in the English law, and in all the constitutional law of this country, up to the adoption of the constitution of the United States, was the meaning which all legal rules of interpretation required that congress and the courts should give to the word in that instrument.

But we are told again that the constitution recognizes the legality of the slave trade, and by consequence the legality of slavery, in the clause respecting the "importation of persons." But the word "importation," when applied to "persons," no more implies that the persons are slaves, than does the word "transportation." It was perfectly understood, in the convention that framed the constitution—and the language was chosen with special care to that end—that there was nothing in the language itself, that legally recognized the slavery of the persons to be imported; although some of the members, (how many

* For proof that such was the meaning of the word "free" in those instruments, I must refer to my argument on "The Unconstitutionality of Slavery."

we do not know), while choosing language with an avowed caution against "admitting, *in the constitution*, the idea that there could be property in man," intended, if they could induce the people to adopt the constitution, and could then get the control of the government, to pervert this language into a license to the slave trade.

This fraudulent perversion of the legal meaning of the language of the constitution, is all the license the constitution ever gave to the slave trade.

Chief Justice Marshall, in the case of the Brig Wilson, (1 *Brockenbrough*, 433–5), held that the words "import" and "imported," in an act of Congress, applied to free persons as well as to slaves. If, then, the word "importation," in the constitution, applies properly to free persons, it certainly cannot imply that any of the persons imported are slaves.

If the constitution, truly interpreted, contain no sanction of slavery, the slaves of this country are as much entitled to the writ of *habeas corpus* at the hands of the United States government, as are the whites.

B

Authorities for the Right of the Jury to judge of the Law in Criminal Cases.

The House of Representatives of the United States, by a vote of more than two to one, once affirmed the right of the jury to judge of the law, in criminal cases, to be an "indisputable right,"—and impeached one of the Justices of the Supreme Court of the United States for infringing it. The following is a copy of the caption, and one of the articles, of an impeachment, found by the House of Representatives, (in 1804), against Samuel Chase, one of the Judges of the Supreme Court.

"*Articles exhibited by the House of Representatives of the United States, in the name of themselves, and of all the people of the United States, against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, in maintenance and support of their impeachment against him, for high crimes and misdemeanors.*"

ARTICLE I.

That, unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason before the Circuit Court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz.

1. In delivering an opinion, in writing, on the question of law, on the construction of which, the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defence.

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite; or from citing certain statutes of the

United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client.

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt, or innocence, *and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give:*

In consequence of which irregular conduct of the said Samuel Chase, *as dangerous to our liberties, as it is novel to our laws and usages*, the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the constitution, and was condemned to death without having been heard by counsel, in his defence, to the disgrace of the character of the American bench, *in manifest violation of law and justice, and in open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people.*"

This charge was made by the House of Representatives, against that judge, by a vote of 83 yeas, to 34 nays. Of course, all those who voted for this charge, believed it to be an "indisputable right of the jury to hear argument, (on the law), and determine upon the question of law, as well as the question of fact, involved in the verdict," and that an infringement of that right was both "dangerous to our liberties," and "novel to our laws and usages," a "manifest violation of law and justice," an "open contempt of the rights of juries, on which, ultimately rest the liberty and safety of the American people." Whether those who voted *nay*, had the same opinion on this point, or whether they voted nay on the ground that the fact of the infringement of the right of the jury was not sufficiently proved, does not appear.

The judge was tried by the Senate on this impeachment. On the trial it was proved that, although the judge, before the trial of Fries was commenced, gave notice to the counsel of Fries that he should lay some restrictions upon them, in addressing the jury on the law, and in citing ancient English authorities, which he considered inapplicable and improper, yet when those restrictions were objected to, he gave them notice that they might have full freedom in those particulars. It also appeared that in his charge to the jury, he said to them:

"It is the duty of the court in this case, and in all *criminal* cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present and in all *criminal* cases, *both the law and the facts*, on their consideration of the whole case."

But notwithstanding his offer of entire freedom to the counsel of Fries in arguing the law, and citing authorities, as they should think proper, and notwithstanding his charge to the jury, distinctly instructing them that they were judges of the law as well as the fact, in that and in all criminal cases, yet, inasmuch as his conduct at the first had been somewhat arbitrary and improper, and such as it was supposed, might prejudice the minds of the jury against Fries, on the question of law involved in his defence, sixteen out of thirty-four Senators voted to convict the judge, on this charge of infringing the right of the jury to judge of the law. The sixteen Senators, who voted for his conviction, of course held that the jury had the right to judge of the law. And it is not only supposable, but highly probable, that of the eighteen Senators, who voted for his ac-

quittal, some or all held the same opinion, but believed that the judge had not really infringed, or intentionally infringed, the right of the jury in that particular.

Thus we have the decided opinions of eighty-three, out of one hundred and seventeen members of the House of Representatives, and of sixteen out of thirty-four, Senators, of the United States, in favor of the doctrine that the jury have the right to judge of the law,—while there is no distinct evidence that either of the other thirty-four Representatives, or the other eighteen Senators, repudiated the doctrine.

The Supreme Court of the United States also, in a charge given to a jury, *in a civil case*, (John Jay, Chief Justice, doing it in behalf of the whole court), gave these instructions to them :—

"It may not be amiss, here gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law that recognizes this reasonable distribution of jurisdiction, *you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy*. On this, and on every other occasion, however, we have no doubt you will pay that respect, which is due to the opinion of the court ; for, as on the one hand, it is presumed that juries are the best judges of facts, it is, on the other hand, presumable that the court are the best judges of law. But still both objects are lawfully within your power of decision." *The State of Georgia vs. Brailsford, et al.* (3 *Dallas* 4).

On the 14th of July, 1798, Congress passed an act for punishing certain libels against the government of the United States. By this act it was declared that "the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

The words "under the direction of the court," may, to unprofessional readers, make the meaning of this provision equivocal. Such readers may think the word "direction," equivalent to "*dictation*." But if that meaning were given to it, the provision would be absurd,—would contradict itself,—for then the jury would *not* "have the right to determine the law and the fact," as the statute provides that they shall have ; but the law would be determined by the court, and the jury would be bound by their determination. The word "direction," then must mean something that is consistent with the jury's "determining the law and the fact," instead of their being bound by any opinion of the court. And that meaning can only be one that is equivalent to advice, guidance, information, instruction, and assistance, which every body admits that a court have a right, and are bound, to render to a jury, still leaving them finally to determine the matter for themselves,—as we see was done by the Supreme Court in the case just cited.

The use of the words "as in other cases," is an admission, on the part of Congress and the president, that "in other cases" "the jury have the right to determine the law and the fact."

In addition to these opinions of Congress, the President, and of the Supreme Court of the United States, I add some other eminent authorities, on both sides of the question.

James Wilson, one of the signers of the Declaration of Independence, one of

the most distinguished among the framers of the United States constitution, and afterwards one of the Judges of the Supreme Court of the United States, says,—

"It is true, that, in matters of law, the jurors are entitled to the assistance of the judges; but it is also true that, after they receive it, they have the right of judging for themselves." 1 *Wilson's Works*, 12.

"The Roman juries were judges of law as well as of fact."
2 *Wilson's Works*, 320.

"The antiquity of this institution among the most civilized people of the world, is urged as an argument, that it is founded in nature and original justice. The trial by a jury of our own equals seems to grow out of the idea of just government, and is founded in the nature of things." 2 *Wilson's Works*, 319.

In the case of United States vs. Battiste, Story said it had been the opinion of "the whole of his professional life," that the jury had *not* the right to judge of the law. 2 *Sumner*, 243.

In United States vs. Wilson, Justice Baldwin, of the Supreme Court of the United States, held that the jury *had* the right to judge of the law.
Baldwin's C. C. R. 108.

Two years afterwards, in the case of United States vs. Shive, the same judge held that they had *not* the right to judge of a particular question of law put in issue in that case. *Baldwin's Rep.*, 510.

In 1804, the Judges of the Supreme Court of New York, in a case of *libel*, were equally divided in opinion on the question,—Kent and Thompson being in favor of the right, and Lewis and Livingston against it.
The People vs. Croswell. 3 *Johnson's Cases*, 337.

At the next session of the legislature of New York an act concerning libels "passed both houses unanimously" providing,

"That on every such indictment or information, the jury, who shall try the same, shall have a right to determine the law and the fact, under the direction of the court, as in other criminal cases." 3 *Johnson's Cases*, 412.

In Commonwealth vs. Knapp, (1830), the Supreme Court of Massachusetts said,—

"As the jury have the right, and, if required by the prisoner, are bound, to return a general verdict of *guilty*, or *not guilty*, they must necessarily, in the discharge of this duty, decide such questions of law as well as of fact, as are involved in the general question. * * *
"It is their duty to decide all points of law, which are involved in the general question of the guilt or innocence of the prisoner." 10 *Pickering*, 496.

In Commonwealth vs. Kneeland, (1838), the same court said,—

"In criminal cases, by the form in which the issue is made up, the jury pass upon the whole matter of law and fact." 20 *Pickering*, 222.

In Commonwealth vs. Porter, (1845), the same court decided that the jury had *not* the right to judge of the law, but were bound to take it as laid down to them by the court. 10 *Metcalf*, 263.

In the case of Townsend vs. the State, the Supreme Court of Indiana held that the jury had *not* the right to judge of the law. 2 *Blackford*, 151.

Two years afterwards, in the cases, Warren vs. the State, and Armstrong vs. the State, the same court held that the jury *had* the right to judge of the law.

4 *Blackford*, 150–249.

In the case of Pierce vs. the State, the Supreme Court of New Hampshire held that the jury had *not* this right. 13 *N. H. Rep.*, 536.

In the case of the State vs. Snow, the Supreme Court of Maine, say,—

"The presiding judge erred, in determining that, in criminal cases, the jury are not the judges of the law as well as the fact. Both are involved in the issue they are called upon to try; and the better opinion very clearly is, that the law and the fact are equally submitted to their determination."

6 *Shepley*, 348.

In the case of the State vs. Jones, the Supreme Court of Alabama say,—

"The power of the jury to judge both of law and fact, results necessarily from the very constitution of that body, and from their right to find a general verdict (of not guilty) for the prisoner, which the court cannot disturb * * When a juror is sworn, he is invested with the office of judge, and authorized to pronounce the law in the particular case he has to try, and does so when he renders his verdict, whether he abides by, or disregards the opinion of the court." 5 *Alabama Reports*, 672–3.

In the case of Montgomery vs. Ohio, the Supreme Court of Ohio held that the jury had *not* the right to judge of the law. 11 *Ohio Rep.*, 424.

In Montee vs. Commonwealth, the Supreme Court of Kentucky said,—

"They (the jury), have the right, in all cases, to find a general verdict of guilty or not guilty. As guilt or innocence, is a deduction from the law and facts of the case, the jury must, therefore, necessarily decide the law, *incidentally*, as well as the facts, before they can say that the accused is guilty or not guilty." 3 *J. J. Marshall*, 149.

The constitution of Kentucky declares that "in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."

The constitution of Indiana has the same provision.

The constitution of Illinois has the same provision.

The constitution of Texas has the same provision.

The constitution of Ohio has the same provision.

The constitution of Tennessee provides that "in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases."

The constitution of Michigan provides that "in all prosecutions or indictments for libels, * * the jury shall have the right to determine the law and the fact."

The constitution of Missouri declares that "in all prosecutions for libels, the truth may be given in evidence, and the jury may determine the law and the facts under the direction of the court."

The constitution of Arkansas provides that "in all indictments for libels, the jury shall have the right to determine the law and the facts."

The constitution of Wisconsin says that "in all criminal prosecutions or indictments for libel, * * * the jury shall have the right to determine the law and the fact."

The constitution of Mississippi declares that "in all prosecutions or indictments for libels, * * * the jury shall have the right to determine the law and the facts under the direction of the court."

The constitution of Maine declares that "in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact."

The new constitution of New York provides that "in all criminal prosecutions or indictments for libels, * * * the jury shall have the right to determine the law and the fact."

The foregoing statutory and constitutional provisions for the right of the jury to judge of the law in cases of *libel*, had their origin in a false decision by Lord Mansfield, in 1784, in which he held that, in the trial of an indictment for libel, the jury had no right to take it upon themselves to judge whether the writing charged as libellous, was really so, or not,—but that they must leave that question wholly with the court. 3 *Term Reports*, 428 *note*.

This decision created much agitation in England, inasmuch as its effect was to give to the judiciary the power to restrain, within such limits as it pleased, the freedom of the press, in the discussion of the characters and conduct of public men. To remove any doubts excited by the decision, and to maintain the legitimate freedom of the press, Parliament soon after passed a special act, "that on the trial of an indictment or information for a libel, the jury may give a general verdict of guilty or not guilty, upon the whole matter put in issue, and shall not be required or directed by the court or judge to find the defendant guilty, merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information." *Stat.* 32 *Geo.* 3, *c.* 60.

The purport of this act is that the jury may judge both of the law and the fact.

The example of Parliament was followed extensively in this country, as the preceding citations show.

On the general question of the right of the jury to judge of the law, in criminal cases, there has been for centuries the same disagreement among judges in England as in this country. If this disagreement proves nothing else, it at least proves this, that the permanent judiciary are utterly unworthy to be intrusted with the decision of the law in criminal cases. If after centuries of controversy, they cannot determine a point so important to the liberties of a people as is the one whether the jury may rightfully judge of the law? that is, whether "the country" may judge of its own liberties? they are manifestly unfit to be entrusted with the decision of any other question involving the freedom of the people.

C.

Mansfield's argument against the Right of the Jury to judge of the law in criminal cases.

Mansfield's argument, if argument it can be called, against the right of the jury to judge of the law, is this.

"They (the jury) do not know, and are not presumed to know, the law; they are not sworn to decide the law; they are not required to do it. * * The jury ought not to assume the jurisdiction of law; they do not know, and are not presumed to know, any thing of the matter; they do not understand the language, in which it is conceived, or the meaning of the terms; they have no rule to go by but their passions and wishes." 3 *Term Rep.* 428 *note.*

One answer to this argument is, that the jury are the "peers" of the accused, and consequently are supposed to know the law as well as he does. *He* is presumed to know the law, otherwise he could not be held guilty of a *criminal intent* in violating it. If, then, *he* is rightfully presumed to know the law, his "peers" must be presumed equally to know it. If his "peers" do not know the law, then it must be presumed that he did not know it, and that he therefore had no criminal intent in transgressing it.

The effect, therefore, of trial by jury, in criminal cases, is to hold no accused person responsible for a more precise or accurate knowledge of the law, than is common to his fellow men. And this is all that he ought to be held responsible for. If he is to be held responsible for a more accurate knowledge of the law than his "peers"—his fellow-men in the same rank and condition of life—he is liable to be held guilty in law, when he had no criminal intent, and had been guilty of no culpable neglect in ascertaining the law—for that neglect cannot be legally culpable, which is common to the mass of mankind.

Mansfield's argument goes to this extent, that the common people, (such as juries are composed of), know nothing of the law, and are not presumed to know any thing of it; and yet, if one of their number transgress it, he is then presumed to have known it, and to have had a criminal intent, (without which there can be no crime), in transgressing it.

This doctrine looks as if *judges*, as well as juries, sometimes "had no rule to go by but their passions and wishes." Whatever imperfection there may be in the judgment of juries, I apprehend they have never, (unless under the dictation of a court), acted upon so atrocious a principle as the one here avowed by Mansfield.

Mansfield's argument is the argument of all who oppose the right of the jury to judge of the law. And it seems to prove very satisfactorily that, if the people cannot trust their liberties in their own hands, there is little hope for them at the hands of judges—for the doctrine of those, who oppose the right of the jury to judge of the law, is, that the people must trust their liberties in the hands of judges, whose reasons and rules of judgment are unintelligible to the people.

and the justice or injustice of whose decisions the people consequently cannot understand.

This doctrine supposes that it is not necessary that the people should know, for themselves, whether they are living under a just government, or a tyrannical one; that if they are ever punished for doing what they think they have a right to do, and what they think they never gave up their right to do, it is quite sufficient for them to have the word of the judges that the punishment is according to law.

Such liberty as this, Mansfield no doubt thought was good enough for mankind at large. But whether it is such liberty as will always satisfy the people themselves, remains to be seen. They will probably prefer a liberty, that is a little more intelligible, even though it should be, (what in reality it would not be), a little less refined.

The people, it is true, are not very learned in the laws. But they have sufficiently clear ideas of liberty, justice, and men's natural rights, to be reasonably competent to determine whether, in a given case, one man has infringed the rights of another, and ought to be punished therefor. And it seems to be a somewhat strong trait in the Anglo-Saxon character, that they prefer to trust their liberties in the hands of their "peers," rather than in the hands of judges, whose pretended superiority in knowledge may be merely a cloak for practising such oppressions as cannot be otherwise justified to the minds of those who are the subjects of them.

Story's argument is substantially the same with Mansfield's, (*United States vs. Battiste*, 2 *Sumner*, 243.)

Mansfield and Story, I think, are the most distinguished authorities of modern times, against the right of the jury to judge of the law. One would infer from their opinions, and the grounds of them, that neither had ever heard, or supposed that the world had ever heard, of the common law of England, or of such an instrument as Magna Charta.

The idea that, in this country, where the people institute government for the preservation of their rights, and where they must be presumed to know what rights they had in view in so doing, they are not competent, as jurors, to judge when those rights are invaded, is absurd.

It cannot be said that if they judge of the law, their ignorance may be dangerous to the prisoner; because if he be convicted against law, he has his appeal to the court. It is only when they acquit, that their judgment is final. Magna Charta does not say that a man *shall be punished* by the judgment of his peers; but only that he shall not be punished "*unless* by the judgment of his peers." He may be acquitted, but cannot be convicted, against their judgment.

D

Effect of Trial by Jury, in nullifying other Legislation than the Fugitive Slave Laws.

If jurors, in criminal cases, have the right to judge of the law, of its constitutionality, and its justice, the trial by jury can be made efficient for nullifying nearly all unconstitutional and unjust legislation ; because it makes it safe to violate, and resist the execution of it.

It would, for instance, make it safe to resist the execution of all those unequal and iniquitous revenue laws, which in reality confiscate ten, twenty, thirty, or fifty per cent of one man's property, under pretence of taxation, while ninety-nine one-hundredths, more or less, of all the other property of the country goes free of taxation ; laws, the object of which is, not only to make one man pay the taxes of others, but also to make the mass of the people pay to a few domestic manufacturers, ten, twenty, thirty, or fifty per cent more for their commodities, than they would be worth in free and open market.

It is as much the duty of a man to defend his property against such laws, as to defend it against pirates and highwaymen. And the execution of such laws would certainly be resisted, if it were understood that jurors had a right, in trying men for such resistance, to judge of the justice of the laws.

The laws against smuggling also, which confiscate a man's entire cargo, as a punishment for evading a tax gatherer, who, but for the evasion, would have seized a half or a quarter of it, would be nullified by the trial by jury, if it were understood that jurors had a right to judge of the justice of the laws.

The laws against smuggling are unconstitutional, as well as unjust. The constitution gives not the slightest authority for laws, that punish men for concealing their property from the tax gatherer. Men have a natural right to conceal their property ; for they may fear other robbers than the tax gatherer. The government must find property before they can tax it ; and when they have found it, they are authorized *only to tax it.* They have no authority to confiscate it, as a punishment to the proprietor for not having voluntarily exposed it for taxation.

The constitution declares simply that " the congress shall have power to lay and collect taxes, duties, imposts, and excises," &c. Here is no authority for confiscating property, which the owner had refused to expose to, or had attempted to conceal from, the tax gatherer.

The constitution gives no more power to confiscate imported goods, for the reason mentioned, than to confiscate domestic property. Suppose a direct tax were laid, who imagines that congress would have power to confiscate all property, which the owners should refuse to expose to, or should attempt to conceal from, the assessors ? Yet they would have the same right in that case, that they have in the case of imported goods ; for the constitution makes no distinction, in this particular, between imported and domestic goods.

The state governments have power to lay taxes also ; but who supposes they have power to confiscate property, or punish the owner by imprisonment, because he refuses to disclose how much money he has in his pocket, or attempts to conceal any other property from the assessors ? Yet the states have as much power to do so, as have congress.

The true trial by jury would also abolish the government monopoly in the carriage of letters and papers. If mankind have any natural rights, the right of transmitting intelligence to each other, in any way that is intrinsically innocent, is one of them. And juries, if they knew their duties, would sustain that right, by refusing ever to convict a man for exercising it.

The laws against this right is another of the many laws, for which the constitution gives no authority. The constitution says simply that " Congress shall have power to establish post-offices and post roads." It gives them no power to forbid others to establish post-offices and post roads in competition with those of Congress. Suppose the constitution had said that Congress shall have power to establish stage coaches, steam-boats, and rail-roads, for the transportation of passengers and merchandize ; does any one imagine that that would have given them any authority to prohibit others from establishing stage-coaches, steam-boats, and rail-roads in competition with those of Congress? Yet that case would have been a parallel one to the post-office power.

The trial by jury would also open all vacant wild lands to the settler, free of charge by, or interference from, the government. The Creator gave lands, not to governments, but to men. And men have the same natural right to take possession of unoccupied wild lands, without permit from the government, that they have to dip water from the stream, to breathe the air, or enjoy the sunshine. And juries, if they knew their duties, would protect men in the enjoyment of this right, by acquitting them, if indicted as trespassers, or for resisting the government in its attempts to dispossess them of their lands.

What is true of lands, is true also of all mines, salt springs, &c., which men find in the earth. A man has the same right to dig gold out of the earth, without asking permission of the government, if he can find a spot unoccupied by any other man, that he has to dig roots.

In the state governments, the trial by jury would abolish all restrictions upon contracts, that are intrinsically lawful, between man and man. It would, for example, abolish the laws which prohibit free banking, and limit the rates of interest ; laws, which make currency scarce, and make credit and capital difficult to be obtained. Also the laws, which forbid the sale of certain commodities, unless inspected by officers of the government ; which forbid men to act as pilots, auctioneers, or innholders, unless specially licensed ; and all other laws, which require that men obtain a special license from the government for doing any act or business that is intrinsically lawful.

In fact the trial by jury would abolish the whole catalogue of laws against acts not criminal in themselves, by which monopolies are sustained, and men are deprived of their natural rights ; laws founded on the principle that the destruction of private rights is promotive of the public good.

The trial by jury would compel the free administration of justice. A man has a natural right to enforce his own rights, and redress his own wrongs. If one man owe another a debt, and refuse to pay it, the creditor has a natural right to seize sufficient property of the debtor, wherever he can find it, to satisfy the debt. If one man commit a trespass upon the person, property, or character of another, the injured party has a natural right either to chastise the aggressor, or to take compensation for the injury out of his property. But as the government is an impartial party, as between these individuals, it is more likely to do exact justice between them, than the injured individual himself would do. The government also, having more power at its command, is likely to right a man's wrongs more peacefully than the injured party himself could do it. If therefore, the government will do the work of enforcing a man's rights, or of redressing his wrongs, *free of expense to him*, he is under a moral obligation to leave the work in the hands of the government,—but not otherwise. When the government forbids him to enforce his own rights, or redress his own wrongs, and deprives him of all means of obtaining justice, except on the condition of his employing the government to obtain it for him, *and of paying the government for doing it*, the government becomes itself an accomplice of the oppressor. If the government will forbid a man to protect his own rights, it is bound to do it for him, *free of expense to him*. And so long as government refuses to do this, juries, if they knew their duties, would protect a man in defending his own rights.

Probably one half of the community are virtually deprived of all protection for their rights, except what the criminal law affords them. Courts of justice, for all civil suits, are as effectually shut against them, as though it were done by bolts and bars. Being forbidden to maintain their own rights by force,—as, for instance, to compel the payment of debts,—and being unable to pay the expenses of civil suits, they have no alternative but submission to many acts of injustice, against which the government is bound either to protect them, *free of expense*, or allow them to protect themselves.

The free administration of justice is one of the principles of Magna Charta. Its language is, "We will sell to no man, we will deny no man, nor defer right or justice." What is it but selling right and justice, to compel a man to pay the cost of it? or any part of the necessary cost of it? There would be the same reason, in compelling a party to pay the judge and the jury for their services, that there is in compelling him to pay the witnesses, or any other *necessary* charges.

The above principle of Magna Charta is incorporated into many of our state constitutions; but it is a dead letter in all of them. But if the trial by jury were rightly understood, the administration of justice would have to be made free, or juries would protect men in defending their rights by force.

This compelling parties to pay the expenses of civil suits, is one of the many cases, in which government is false to the fundamental principles, on which it is based. What is the object of government but to protect men's rights? On what principle does a man pay his taxes to the government, except on that of contributing his proportion towards the necessary cost of protecting the rights of

all? Yet when his own rights are actually invaded, this government, which he contributes to support, becomes his enemy, and will neither protect his rights, (except at his own cost), nor suffer him to do it himself.

The free administration of justice would promote simplicity and stability in the laws. The mania of legislation would be in a great measure restrained, if the government were compelled to pay the expenses of all the suits that grow out of it.

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